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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2065

LEONARD HORWITZ,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JONATHAN W. LUBELL
MARY K. O'MELVENY
COHN, GLICKSTEIN, LURIE, OSTRIN,
LUBELL & LUBELL
1370 Avenue of the Americas
New York, New York 10019
Attorneys for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner, Leonard Horwitz ("Horwitz"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit remanding the decision and order of the United States District Court for the Southern District of New York and holding applicable to petitioner's case the standards enunciated by the Court in *United States* v. *Turkish*, —— F.2d —— (Docket Nos. 79-1326, 79-1396 May 27, 1980) ("*Turkish*"). The District Court had granted a new trial on grounds that the Government's selective use of its power to immunize witnesses deprived Horwitz of due process of law.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, not yet officially reported, is reproduced in Appendix A (1a-10a) to this Petition. The opinion and order

of the District Court granting petitioner's motion for a new trial on due process grounds and stating that the testimony of government witnesses might be excluded on retrial unless requested use immunity was granted to potential defense witnesses is reported at 476 F.Supp. 775 (S.D.N.Y. 1979), and is reproduced in Appendix B (11a-26a). The opinion of the Court of Appeals for the Second Circuit in *United States* v. *Turkish* is unreported and is reproduced in Appendix C (27a-51a).

Jurisdiction

The decision of the Court of Appeals for the Second Circuit was filed and judgment entered on May 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented for Review

1. Whether the Court of Appeals should have affirmed the District Court's holding below that, in the unique circumstances before it, the Government's selective application of its power to immunize witnesses deprived petitioner Horwitz of fundamental rights protected by the Fifth and Sixth Amendments to the Constitution?

2. Whether the restrictive standard enunciated by the Court of Appeals in *United States* v. *Turkish* and held applicable to petitioner has so severely limited the application of due process principles to the issue of defense witness immunity as to undermine those very principles?

3. Whether the restrictive standard enunciated by the Court of Appeals in *Turkish* for evaluating requests for defense witness immunity presents a fundamentally unfair obstacle to the search for truth in federal criminal trials?

4. Whether the restrictive standard enunciated by the Court of Appeals in *Turkish* has unduly impaired the District Court's supervisory powers to ensure the fairness of federal criminal trials?

5. Whether the restrictive standard enunciated by the Court of Appeals in *Turkish*, which is "in fundamental disagreement" with the standards enunciated by the United States Court of Appeals for the Third Circuit in *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980), creates a serious risk of inconsistent interpretations of due process principles and conflicting adjudications of fundamental constitutional rights?

6. Whether the Court of Appeals was correct in holding appealable as a "conditional suppression order" that portion of the decision of the District Court granting Horwitz a new trial which stated that certain testimony of the Government's witnesses might be subject to a motion to suppress at the third trial?

Statement of the Case

This case arises from an appeal by the United States of America ("Government") from an order of the United States District Court for the Southern District of New York (Hon. Robert W. Sweet) granting Horwitz's motion for a new trial pursuant to Rule 33, Fed. R. Crim. P. after jury verdict* and before sentencing in a second trial.**

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* The District Court opinion erroneously states that Horwitz was charged and found guilty of engaging in a pattern of racketeering (11a, n.1). Horwitz was not charged in Count One of the indictment.

** The first trial ended in a mistrial after seven days of jury deliberations. On its last vote, the jury was deadlocked regarding

The District Court held that Horwitz was denied due process of law due to a combination of particular facts involving the Government's selective use of its immunity power. In granting Horwitz a third trial, the District Court stated that the constitutional defects inherent in the particular facts before it could be remedied by excluding testimony by the Government's immunized witnesses unless limited use immunity was granted to the two defense eyewitnesses (25a).*

The Court of Appeals determined that the "conditional suppression order" aspect of the District Court's opinion was properly appealable pursuant to 18 U.S.C. §3731 (6a-8a). The Court declined to affirm the District Court's decision, remanded the case for reconsideration in light of the decision in *Turkish,* finding that *Turkish* had "significantly undercut the analytical foundation" of the District Court's decision (9a), and suggested that consideration be given to "entering a judgment of conviction as an alternative to a third trial" (10a).

Facts

The District Court based its ruling upon several unique facts surrounding the Government's grant of broad immunity to the two key witnesses against Horwitz while

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Horwitz: 7-5 for acquittal on Count 24 (the obstruction of justice count) and 5-7 to 6-6 on Counts Two through Eleven, the various stock conspiracy and fraud counts which comprised the remaining charges against him. *See* Affidavit of Jonathan W. Lubell, sworn to February 5, 1979, para. 3.

* The District Court stated that the motion for a new trial was granted with "much reluctance" since Horwitz had "already endured two lengthy, costly trials" and noted that "because the 'interests of justice' are insufficient reason for dismissing an indictment," "immunized testimony by witnesses from *both* sides" at a third trial would best serve those interests (25a-26a).

refusing to grant "even limited use immunity" to the two proposed defense "witnesses to the events at issue," a decision which rendered them "unavailable" to the defense (12a, 14a-15a).

The Scope and Impact of the Government's Immunity Grants

Late in the fall of 1977, the Government's main witness against Horwitz, Norman Brodsky ("Brodsky"), entered into discussions with the Government concerning a broad immunity grant. He was told that such a grant would only be given if he could "get" executives of Warner Communications, Inc. ("Warner"), particularly Jay Emmett ("Emmett"), one of the two eyewitnesses denied limited use immunity to testify for Horwitz. Brodsky testified at both trials concerning his understanding of the Government's "paramount" interest in Emmett, and of his willingness "to go to any lengths" to satisfy that interest.* Far beyond the limited use immunity provided by the Immunity Act of 1970, 18 U.S.C. §6002-6003, Brodsky was ultimately granted immunity from prosecution encompassing "all crimes which he had committed, whether or not known to the government at the time of the grant" (19a). The immunity grant induced Brodsky to become "an active government agent" as well as a witness (*Id.*). The District Court found that Brodsky's "incentive for going 'to any lengths'" to obtain immunity was

> apparent when he was asked on cross examination if the jail term to which he was exposed by past crimes

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* The District Court summarized Brodsky's testimony as follows: "As a result of these conversations with the government, Brodsky testified he believed that in order to be immunized he would have to tape a conversation of Horwitz describing 'what happened with the executives at Warner Communications. . . .' (Transcript at 2183). Brodsky was 'willing to go to any lengths to do it.' *Id.*" (19a).

> "could encompass at least a couple of hundred years in jail?", and he replied: "Probably a couple of thousand." (Transcript at 2116).
>
> (*Id.*)

Kosman, the other main witness against Horwitz, received immunity from prosecution for related crimes known to the United States Attorney's office in exchange for his providing information and testifying at trial.* Kosman also was promised that his "cooperation" would be indicated to his sentencing judge in an unrelated prosecution (20a). Notes of the Government's interviews of Kosman provided to defense counsel were conceded by Assistant United States Attorney Campbell during trial to have been deliberately coded and maintained in a manner to "limit their usefulness" to the defense and "create misleading impressions when used by defense counsel on cross-examination" (Tr. 1380).** The District Court found that these notes were, in fact, "rendered useless" and held that "one cannot determine whether the notes do, in fact, contain exculpatory information" as required under *Brady* v. *Maryland*, 373 U.S. 83 (1963) (Tr. 2547). The improper handling of the Kosman notes was found by the District Court to be "a deceptive practice which is not worthy of the United States Attorney's Office" (*Id.*).

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* The District Court found "important for present purposes" Kosman's belief that he was testifying "pursuant to an immunity grant", even though the Government contended after trial that he had only received "leniency", since "that belief may have colored Kosman's testimony" (14a, n.6).

** References to pages of the trial transcript will appear preceded by "Tr.".

The Status of the Proposed Defense Witnesses

The two proposed defense witnesses, Emmett and Solomon Weiss ("Weiss"), were subpoenaed to and did testify before the grand jury. At the time their counsel were told that they were not targets of the investigation (Tr. 3705-B, 3705-C), the Government was promising Brodsky broad immunity to obtain evidence against them (Tr. 2177, 2182, 2183) (19a). The sworn testimony of Emmett and Weiss before the grand jury was reviewed *in camera* by the District Court and found to be exculpatory of Horwitz as well as probative and not cumulative (20a, 12a). When the Government's investigatory focus upon them became clear, Emmett and Weiss invoked their Fifth Amendment Privilege at the trial and declined to testify unless a grant of use immunity was made.* The District Court's request to the Government to consider granting "limited use immunity" to Emmett and Weiss so they could present confined testimony on "matters highly relevant to material issues" was refused because "both witnesses were the subject of a continuing investigation" (13a).

The Centrality of Warner to the Evidence Concerning Horwitz

The District Court found that the "principal evidence" against Horwitz was provided by Brodsky and Kosman and that the "major thrust of their testimony" was that

> Horwitz stated that he had paid money to Emmett and Weiss to induce them to cause Warner Communications, Inc. ("Warner") to purchase shares of stock

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* The investigation has now continued for over 30 months with no charges brought against either individual. Brodsky's testimony regarding the Government's "paramount interest" in the Warner executives and his willingness "to go to any lengths" to satisfy it could only strengthen the resolve of Emmett and Weiss to invoke the Privilege.

> in the Westchester Premier Theatre ("the Theatre") an inducement which was concealed from the investing public.
>
> (15a)

The Court of Appeals found that the testimony concerning Warner "was supplied primarily by Brodsky" (3a-4a).

The Government presented no eyewitnesses to the alleged payoff by Horwitz to Emmett and Weiss. In fact, the Government's denial of immunity to Emmett and Weiss prevented the only possible eyewitness testimony to this charged event.* Presentation of any other defense witnesses would only have further highlighted the absence of the eyewitnesses.** Evidence against Horwitz provided by the third witness, Carino, "may not have been sufficient to survive Horwitz's motion pursuant to Rule 29, Fed. R. Crim. P." (15a, n.7). The other evidence against Horwitz involved checks drawn by Warner and other routine company documents,*** and statements by Horwitz tape-recorded by Brodsky as the Government's agent. The latter evidence contained Horwitz's explicit denial of any knowledge of the charged payoff to Emmett and Weiss.

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* Horwitz could not have testified on this matter and preserved his Fifth Amendment Privilege.

** Corroborative defense witnesses necessarily required the basic foundation testimony of Emmett and Weiss.

*** Exculpatory testimony by Emmett and Weiss, corporate officers of Warner, regarding these normal business documents would have eliminated the incriminating hearsay shadow cast upon them by Brodsky's and Kosman's testimony.

The Decisions Below

The District Court

The District Court found that the Government's selective exercise of its immunity power* deprived Horwitz of his due process rights, "including his right to put any witness on the stand who was 'capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense'," citing *Washington* v. *Texas,* 388 U.S. 14, 23 (1967) (24a).**

The District Court emphasized several specific factors in reaching its conclusion: the centrality of the evidence supplied by the immunized witnesses; the eyewitness nature of the exculpatory testimony proffered by the defense witnesses; the facts surrounding Brodsky's grant of immunity in order to obtain information about the Warner executives and, in particular, Emmett; the broad immunity grant conferred on Brodsky and, to a less but still significant extent, on Kosman, compared to the very limited use immunity sought for Emmett and Weiss; the fact that the

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* The Court neither challenged the normal "sole discretion" of the Government to grant or deny immunity, nor held that it had "independent power" to grant immunity to a necessary defense witness (12a, n.3).

** The Court found "central" to the due process issue presented "the question of what obligation is placed upon the government in connection with the search for truth in a criminal proceeding. While the government need not in every circumstance grant immunity to potential defense witnesses, here, where the foundation of th government's case against Horwitz was built by means of a far-reaching immunity grant, and where the evidence sought by the defense is affected by the government's continuing investigation of the potential defense witnesses, the denial of limited use immunity resulted in an unfair trial." (23a)

proffered exculpatory testimony was evidenced by the grand jury transcript of testimony taken when neither witness believed they were under investigation; the assertions of both Emmett and Weiss in court of their willingness to testify under immunity; and the probative, noncumulative nature of the proposed exculpatory evidence (12a, 13a, 15a, 19a-20a, 24a). The District Court held that the constitutional prejudice suffered by Horwitz as a result of the Government's selective grants of immunity could be remedied at a third trial by suppression of Brodsky's testimony unless Emmett and Weiss were granted immunity (25a). The Court found that the "interests of justice" would best be served by a trial which contained "immunized testimony by witnesses from *both* sides" (26a).

The Court of Appeals Decisions

A. Remand

The Court of Appeals remanded the case in light of the decision two days earlier by another panel of the Court in *Turkish* which was characterized as addressing "a reverse immunity claim substantially similar to that asserted by appellee Horwitz" (8a). *Turkish* was described as having "significantly undercut the analytical foundation upon which Judge Sweet's grant of a new trial to Horwitz and conditional suppression of the Brodsky testimony were premised" (9a). While characterizing Horwitz's argument that the District Court's order was not appealable as a "substantial one" (6a), the Court of Appeals nonetheless held that the conditional nature of the District Court's ruling did not "necessarily deprive" it of jurisdiction to hear the appeal under 18 U.S.C. §3731 (7a). Holding that §3731 must be "liberally" construed, the Court found that "the government, the defense, and the district court have

embarked upon a collison course that will almost certainly result in the suppression of the Brodsky testimony" which, "under the circumstances", made the exercise of jurisdiction appropriate (8a). The Court did acknowledge its lack of jurisdiction to review the District Court's grant of a new trial but also "suggested" that "if Horwitz's reverse immunity claim is found to be untenable in light of *Turkish,* the district judge consider entering a judgment of conviction upon the jury verdict as an alternative to a third trial" (10a).

B. *Turkish*

Turkish involved an appeal by a commodities trader from a judgment of conviction for income tax evasion, filing false tax returns and conspiracy to defraud the Government using various tax avoidance schemes in the commodities futures market (28a-29a). *Turkish* was found to have been "a principal participant" in the scheme (28a).* Following the close of the Government's case, which included testimony by six witnesses involved in the fraudulent transactions who were granted some form of immunity,** the defense sought use immunity for seventeen prospective witnesses (30a-31a).

District Judge Vincent Broderick held that a defense right to require immunization of a witness might be required by the Due Process Clause of the Fifth Amendment, but ruled that the defense motion was untimely and found

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* By contrast, in the case at bar, Brodsky was disclosed to be a principal participant in the stock conspiracy charges, together with three other defendants. Horwitz was not charged with playing a central role.

** None of the six witnesses received the type of sweeping immunity granted to Brodsky.

that, in any event, no showing had been made that any of the proposed witnesses would give "material, exculpatory testimony" (32a).*

The *Turkish* Court found defense witness immunity "much discussed by courts and commentators," and interest "considerably heightened" following *Kastigar* v. *United States,* 406 U.S. 441 (1972), which upheld the constitutionality of the "use" immunity statute (32a-33a). It noted Third Circuit "appellate decisions ruling in favor of defense witness immunity",** and acknowledged other Circuit decisions which had been "careful to deny the claim only with respect to the precise facts presented" (34a-36a). The Court acknowledged two prior Second Circuit decisions which "explicitly left open the possibility that defense witness immunity might be required if grants of use immunity to prosecution witnesses resulted in an 'unfair advantage' " (36a).

Turkish held that "the established content of the Sixth Amendment does not support a claim for defense witness immunity," finding that the Amendment did not carry with it the right or obligation to "displace a proper claim of privilege" with use immunity (36a-37a). The Court then noted that "a more plausible basis for defense witness immunity" could "arguably" be found in "the more general and perhaps developing requirement of basic fairness pro-

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* Judge Broderick's findings on the merits of Turkish's immunity request were thus in complete contradiction to Judge Sweet's findings regarding Horwitz's request.

** Although the *Turkish* decision characterized opinion in the Third Circuit as "divided" (34a), the most recent decision of that Circuit, *Government of the Virgin Islands* v. *Smith,* 615 F.2d 964 (3d Cir. 1980), set clear standards for judicial determination of defense witness immunity claims under both 18 U.S.C. §6002 and traditional judicial powers to ensure fairness in criminal proceedings (35a).

tected by the Fifth Amendment's Due Process Clause," a requirement proceeding from "two basic arguments":

> First, as this Circuit hinted in *Gleason* and *Lang*, unfairness may inhere in some situations because the Government's grant of use immunity to its witnesses affords it an advantage over the defendant's ability to present a defense. Secondly, to the extent that a trial is viewed as a search for the truth, denial of defense witness immunity may in some circumstances unfairly thwart that objective.
>
> (37a)

The Court first rejected "equalization" as a "sound principle" upon which to rest Fifth Amendment fairness requirements (37a-38a). Finding demands of the pursuit of truth to have "somewhat greater force", the Court nevertheless rejected this principle as well, stating that "the concept of a trial as a search for the truth has always failed of full realization whenever important facts are shielded from disclosure because of a lawful privilege" (38a-39a). The Court noted several "substantial concerns" implicated by a general rule permitting defense witness immunity (39a-41a) and questioned whether the balancing of such concerns against "the defendant's interest in securing truthful exculpatory testimony through defense witness immunity" was "appropriately a judicial function" (41a). The Court stated that "confronting the prosecutor with a choice between terminating prosecution of the defendant or jeopardizing prosecution of a witness is not a task congenial to the judicial function" (42a).

The Court specifically rejected the fairness standards set out in the Third Circuit's decision in *Smith* (44a), holding that

> [w]ithout precluding the possibility of some circumstances not now anticipated, we simply do not find in the Due Process Clause a general requirement that defense witness immunity must be ordered whenever it seems fair to grant it. The essential fairness required by the Fifth Amendment guards the defendant against overreaching by the prosecutor, . . . and insulates him against prejudice. . . . It does not create general obligations for prosecutors or courts to obtain evidence protected by lawful privileges.
>
> (44a-45a; citations omitted)

The Court agreed that the District Court had properly rejected the defense demand for immunity as "untimely" and had correctly refused to order immunity based upon its assessment of the proffered testimony as "cumulative, immaterial, or impeaching only on collateral matters" (45a-46a). It then held that "trial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution," setting the following standard for all cases:

> No hearing should be held to establish such status. The prosecutor need only show that the witness has been indicted or present to the court *in camera* an *ex parte* affidavit setting forth the circumstances that support the prosecutor's suspicion of the witness's criminal activity. No duty is imposed upon the prosecutor; he simply has an option to rely upon the witness's status as an actual or potential target of prosecution to foreclose any inquiry concerning immunity for that witness. If a case should arise where the witness is not an indicted defendant and the prosecutor cannot or prefers not to present any claim that

the witness is a potential defendant, and if the defendant on trial demonstrates that the witness's testimony will clearly be material, exculpatory, and not cumulative, it will be time enough to decide whether in those circumstances a court has any proper role with respect to defense witness immunity.

(47a)*

REASONS FOR GRANTING THE WRIT

The Standard Established by the Court of Appeals for Evaluating Selective Exercise of the Immunity Power Undermines Critical Fifth and Sixth Amendment Rights Without Regard to the Circumstances of a Particular Case or the Judiciary's Role in Safeguarding Those Rights in a Proceeding Premised Upon the Search for Truth.

1. The Sweeping Standard Prescribed in *Turkish* Impairs the Ability of the Judiciary to Guarantee a Fair Trial

The District Court's carefully tailored decision below was entirely consistent with the historical role of the judiciary in our tripartite governmental system. The interdependence of the three branches necessary to a workable government has been repeatedly recognized by this Court.** That executive branch functions may be affected by judicial action in aid of basic constitutional guarantees

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* Judge Lumbard, concurring and dissenting in part, rejected the suggestion that a trial court could ever inquire into the "propriety" of the Government's refusal to confer immunity (48a), and concluded that the district court should be "prohibited" from entertaining or inquiring into its possible grant (51a).

** *E.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *Buckley* v. *Valeo*, 424 U.S. 1, 120-123 (1976); *Hampton & Co.* v. *United States*, 276 U.S. 394, 406 (1928); *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

has not been held to deprive a court of power to determine whether due process principles are satisfied in a particular trial. In *United States* v. *Nixon,* 418 U.S. 683, 707 (1974) this Court clearly reaffirmed "the primary duty of the Judicial Branch to do justice in criminal prosecutions":

> Our system of Government "requires that federal courts on occasion interpret the constitution in a manner at variance with the construction given the document by another branch." *Powell* v. *McCormack* [395 U.S. 486 (1969)].
>
> (*Id.* at 704)

In rejecting the claim that executive privilege precluded production of otherwise relevant evidence in a criminal proceeding, this Court carefully described the Fifth and Sixth Amendment underpinnings of the adversary system's quest for the truth:

> The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.
>
> (*Id.* at 711)*

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* This Court's concern over sweeping limitations upon the ability to present all relevant facts within the boundaries of evidentiary rules is repeated throughout the *Nixon* decision: "The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts," *Id.* at 709. "The allowance of the privilege to withhold evidence that

The District Court's careful assessment that the unique circumstances before it had impermissibly placed in jeopardy petitioner's constitutional rights fell squarely within the critical judicial role long upheld by this Court. The standard articulated in *Turkish* and imposed below, however, unduly restricts that role and thus diminishes the system's ability to arrive at the truth in criminal proceedings.

2. No Prior Decision on the Issue of Defense Witness Immunity Has So Completely Foreclosed Judicial Due Process Inquiries

The *Turkish* court did not need to set the sweeping standard it did in affirming the District Court's denial of immunity (45a-47a). In deciding to enunciate a rule of wide application to all defense witness immunity requests, the Court reviewed the history of the issue and its resolution by the Courts,* but then adopted an inflexible approach neither required by nor consistent with those precedents. The *Turkish* court made only a passing reference to the statement of the Chief Justice, then a Circuit Judge, in *Earl* v. *United States,* 361 F.2d 531 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967) (32a), an opinion characterized by the District Court herein as "seminal" on the issue of whether a due process claim may arise from the Government's selective exercise of the immunity power (20a). There, the Chief Justice had noted:

> We might have quite different, and more difficult, problems had the Government in this case secured

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is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts," *Id.* at 712.

* The *Turkish* court acknowledged that "the Commentators have generally been favorable to the notion of reverse immunity" (32a, n.1).

> testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused. . . .
>
> (*Id.* at 534, n.1)*

As the Courts considered particular defense immunity claims following *Earl,* certain well-defined criteria emerged to govern the evaluation of due process demands. The application of these criteria to claims for defense witness immunity resulted in rejection of virtually every claim but still recognized that due process required a careful factual inquiry. Requested immunity was rejected because it was not timely or clearly made [e.g., *United States* v. *LaDuca,* 447 F.Supp. 779, 785, 789 (D.N.J.), *aff'd on other grounds sub nom. United States* v. *Rocco,* 587 F.2d 144 (3d Cir. 1978), *United States* v. *Bautista,* 509 F.2d 675 (9th Cir.), *cert. denied,* 421 U.S. 976 (1975)]; because the proffered testimony was cumulative [e.g., *United States* v. *Alessio,* 528 F.2d 1079 (9th Cir.), *cert. denied,* 426 U.S. 948 (1976)]; or not material or probative [e.g., *United States* v. *Wright,* 588 F.2d 31, 35 (2d Cir. 1978), *cert. denied,* 440 U.S. 917 (1979)]; or not sufficiently exculpatory to raise due process concerns [e.g., *United States* v. *Gleason,* 616 F.2d 2, 27-28 (2d Cir. 1979), *cert. denied,* —— U.S. ——, 100 S.Ct. 1320

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* The immunity statute before the *Earl* Court was superceded in 1970 by the Immunity Act subsequently upheld in *Kastigar* v. *United States, supra,* a change which eliminated fears that broad transactional immunity would be required for proposed defense witnesses rather than the far more limited use immunity sought below (*See* 32a-33a).

(1980), *United States* v. *Lenz*, 616 F.2d 960, 963-964 (6th Cir. 1980)]; or speculative [e.g., *United States* v. *Carmon*, 577 F.2d 556, 561 (9th Cir. 1978)]; or because the Government had not immunized its own witnesses [e.g., *United States* v. *Lang*, 589 F.2d 92 (2d Cir. 1978), *United States* v. *Jenkins*, 470 F.2d 1061 (9th Cir. 1972)]; or the willingness of the witness to appear was uncertain [e.g., *United States* v. *Wright, supra, United States* v. *Lenz, supra*]; or because the Court considered the request to immunize the witness within the context of judicial power under the immunity statutes rather than within due process parameters [e.g., *United States* v. *Housand*, 550 F.2d 818, 824 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977), *Earl* v. *United States, supra; United States* v. *Smith*, 542 F.2d 711, 715 (7th Cir. 1976), *Thompson* v. *Garrison*, 516 F.2d 986, 988 (4th Cir. 1975)]. Several decisions specifically recognized that important Fifth and Sixth Amendments concerns were implicated by the manner in which the immunity power was exercised in the particular case at hand. *United States* v. *Herman*, 589 F.2d 1191, 1203-1205 (3rd Cir. 1978), *cert. denied*, 441 U.S. 913 (1979); *United States* v. *Alessio, supra*, 528 F.2d at 1081-1082; *United States* v. *Bautista, supra*, 509 F.2d at 677; *United States* v. *Jenkins, supra*, 470 F.2d at 1064.

In *Herman*, the Third Circuit explicitly held that proof of prosecutorial decisions "made with the deliberate intention of distorting the judicial fact finding process" justified an exercise of the court's "inherent remedial power" to redress the distortion through an immunity grant, 589 F.2d at 1204. The *Herman* court suggested that this inherent power permitted it to "effectuate the defendant's compulsory process right" where the testimony sought was "essential to an effective defense", but declined to set specific standards in that case, *Id.* at 1204-

1205. Subsequently, in *Government of the Virgin Islands* v. *Smith, supra,* the Circuit found such remedial powers appropriate:

> [T]he need for "judicial" immunity is triggered, not by prosecutorial misconduct or intentional distortion of the trial process, but by the fact that the defendant is prevented from presenting exculpatory evidence which is crucial to his case.
>
> (615 F.2d at 969)

The Court adopted careful standards against which to measure the validity of the immunity claim:

> [B]efore a court can grant immunity to a defense witness, it must be clear that an application has been made to the district court naming the proposed witness and specifying the particulars of the witness' testimony. In addition, the witness must be available and the defendant must make a convincing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case. Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witness. Once the court determines that the defendant has satisfied this threshold burden, the focus then shifts to consideration of the state's countervailing interest, if any.*
>
> (615 F.2d at 972-973)

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* In direct contrast to the *Turkish* ruling below, the Third Circuit held that the Government's "legitimate interest in prosecuting the very witnesses whom the defendant seeks to immunize" does "not mean that no accommodation can be reached between the government's interest as prosecutor and the defendant's constitutional right to present an effective and entire case." Noting several "op-

These clear and specific guidelines, which coincide with the findings of the District Court below, are consistent with the demands of due process. The *Turkish* decision, however, removes such matters from judicial scrutiny and response and precludes any inquiry once the Government states that the proposed defense witness is under investigation.*

3. The Decisions Below Create a Substantial Risk of Inconsistent Adjudications of Critical Due Process Rights

The *Turkish* rule not only removes a critical due process issue from judicial review, but does so in a manner in direct conflict with the rule now governing trials in the Third Circuit when the identical issue arises. The *Turkish* panel conceded that their pronouncement and underlying analysis was in "fundamental disagreement" with the Third Circuit's decision in *Smith* (44a). Thus, for example, were Judge Sweet's decision under consideration by the Third Circuit, *Smith* provides ample basis for affirming that decision. Relying upon *Turkish*, however, the panel below remanded with the suggestion that the conviction be reinstated. Particularly in the area of criminal law, such a dramatic conflict between the Circuits creates confusion,

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tions" which could permit preservation of the Government's interest, including "postponement of the defendant's trial so that it may complete its investigation of the defense witness," the Court held that availability of any such options would eliminate any "significant interests which countervail the defendant's due process rights." 615 F.2d at 973.

* The *Turkish* court noted that "precise facts" concerning witness immunity requests varied (36a). Rather than articulate a set of standards for determining such claims, however, the Court instead vested the Government with the power to remove from the courts the right to make constitutional determinations based upon the particular facts by merely bringing the proposed defense witness within an investigation of suspected criminal activity.

disaffection, and lack of faith in the fundamental fairness of our judicial system.*

The conflict now existing between the Second and Third Circuits goes directly to the heart of fundamental Fifth and Sixth Amendment rights. In *Smith*, the Third Circuit found due process interests directly implicated by the defense witness immunity issue, holding this Court's prior decisions in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Roviaro* v. *United States*, 353 U.S. 53 (1957) to mandate affirmative efforts by the judiciary to ensure the guarantee of a fair trial to defendants, including the "right to present an effective defense". 615 F.2d at 970-973. The Court noted this Court's recognition in *Williams* v. *Florida*, 399 U.S. 78, 82 (1970) that

> the essential task of a criminal trial is to search for truth, and that this search is not furthered by rules which turn the trial into a mere "poker game" to be won by the most skilled tactician.
>
> (*Id.* at 971)

Although the District Court below recognized these constitutional principles in ordering a new trial for petitioner, the Second Circuit rejected them as properly governing the issue, while acknowledging that a "plausible basis" for granting defense witness immunity might be found in

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* This Court has frequently recognized the importance of granting certiorari to resolve Circuit Court conflicts on constitutional issues or "troublesome question[s] in the administration of justice." *See, e.g. Fuller* v. *Oregon*, 417 U.S. 40, 42 (1974); *Linkletter* v. *Walker*, 381 U.S 618, 620 (1965). As Mr. Justice White observed in *Masri* v. *United States*, 434 U.S. 907 (1977) (dissenting from denial of certiorari): "This Court should grant certiorari in such cases as this, where a defendant's rights would be notably different depending upon the Circuit in which he is tried, and where the record affords a clear opportunity to address the question in conflict."

the Due Process Clause (37a), and that the "need to pursue the truth" provided "somewhat greater force" for such a grant (38a). The *Turkish* court ruled that assertion of lawful privileges had always meant that the search for truth "failed of full realization" (39a),* and declined to find support in this Court's prior constructions of due process demands to ensure as full a realization as possible of the truth.

As a result of the decisions below, the parameters of a defendant's due process rights now have a completely different scope in the Third Circuit than they do in the Second Circuit.**

4. The *Turkish* Standard Permits Even Intentional Deprivations of Due Process to Escape Judicial Review

Even where selective immunity decisions are determined by bad faith on the part of the prosecution, *Turkish* forecloses inquiry into motive once the Government states that the witness is a subject of an investigation.*** Although

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* The *Turkish* view that the search for the truth has always been impaired by lawful privileges which shielded important facts from disclosure (39a) misses the point. Due process issues arise because the Government has been able to override the Privilege to obtain one version of the facts while refusing to allow the defendant to similarly present another version of the facts. It is in this distorted picture that the search for the truth is most seriously impaired, particularly where the Government's version rests on hearsay and the precluded defense version is from alleged eyewitnesses.

** Similarly, while the Third Circuit in *Smith* found this Court's decision in *Simmons* v. *United States*, 390 U.S. 377, 394 (1968) to directly support "an inherent judicial power to grant witness immunity in order to vindicate constitutional rights", 615 F.2d at 971, the Second Circuit in *Turkish* specifically refused to consider *Simmons* as precedent for defense witness immunity (42a, n.4).

*** The Government argued below that due process considerations could not apply to the defense witness immunity issue unless

the District Court below did not cite deliberate instances of governmental misconduct with regard to Horwitz, it did find that Horwitz had met, "on the peculiar facts of this case," the burden of proof suggested by *United States* v. *Herman, supra,* 589 F.2d at 1204, that "the government's decisions were made with the deliberate intention of distorting the judicial fact finding process" (22a, n.13).

The *Turkish* restriction upon "any inquiry concerning immunity" thus removes from judicial scrutiny all considerations of fundamental fairness as well as actual instances of prosecutorial misconduct.

> No duty is imposed upon the prosecutor; he simply has an option to rely upon the witness's status as an actual or potential target of prosecution to foreclose any inquiry concerning immunity for that witness.*
>
> (47a)

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prosecutorial bad faith was involved (Government's Br. p. 28-29). Although this contention is dramatically contradicted by this Court's holding in *Brady* v. *Maryland, supra,* 373 U.S. at 87, the *Turkish* standard extends beyond this argument and permits even deliberate, bad faith conduct by the Government to escape judicial remediation.

* The Court left open a case "where the witness is not an indicted defendant and the prosecutor cannot or prefers not to present any claim that the witness is a potential defendant, and if the defendant on trial demonstrates that the witness's testimony will clearly be material, exculpatory, and not cumulative" (*Id.*). The facts before the District Court below met every aspect of this open area except the Government's contention that, after more than two and a half years, the two potential witnesses are still under a "continuing investigation." The Court's restrictive approach appears to mean that a witness under governmental scrutiny for suspected criminal activity unrelated to matters raised in the pending trial would still be unable to testify under limited immunity.

5. The Decision Below Alters Established Rules of Appellate Review

The Court of Appeals held the District Court's decision below to be an appealable suppression order even though no testimony was actually suppressed at the time of the appeal.* 18 U.S.C. §3731 was construed "liberally" to include the purpose of "permitting the government to appeal immediately from adverse pretrial rulings suppressing or excluding evidence" (6a). The Court stated that

> we do not think that the conditional nature of the district court's ruling, which raises the remote prospect that suppression will not be ordered, necessarily deprives this court of jurisdiction under section 3731 to hear the government's appeal.
>
> (7a)

The Court ultimately gave no weight to either the District Court's stated willingness to consider alternatives which would preserve the integrity of the fact-finding process without an outright immunity grant or to the possibility of termination of the Government's investigation of the witnesses prior to trial (Pre Trial Tr. 3, 7).

The interpretation placed by the Court of Appeals upon normal rules of appealability represents a further incursion into the discretion of trial courts to supervise criminal

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* Following its grant of a new trial to Horwitz, the District Court held, at the Government's request, a pre-trial conference. While the Court stated that it would "in all probability" adhere to its opinion and suppress the testimony if the Government sought to introduce Brodsky's testimony without immunizing Emmett and Weiss, it also requested counsel to consider using the Grand Jury testimony of Emmett and Weiss as an alternative to an immunity grant. (Tr., Pre-Trial Proceedings, August 29, 1979, p.4, 7); (Supplemental Appendix, S.A. 4, 7, Appellee's Br. to Court of Appeals) (hereafter "Pre-Trial Tr.").

proceedings and does so at the cost of further burdening appellate courts with appeals not previously thought appropriate for interlocutory review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN W. LUBELL
MARY K. O'MELVENY
COHN, GLICKSTEIN, LURIE, OSTRIN,
LUBELL & LUBELL
Attorneys for Petitioner

Appendix A

(Opinion of Court of Appeals, May 29, 1980)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 644—September Term 1979

(Argued January 23, 1980 Decided May 29, 1980.)

Docket No. 79-1343

UNITED STATES OF AMERICA,

Appellant,

—against—

LEONARD HORWITZ, a/k/a "The Fox,"

Defendant-Appellee.

Before:

SMITH* and FEINBERG, *Circuit Judges,*
and OWEN, *District Judge.***

Appeal from suppression order entered in the United States District Court for the Southern District of New York by Judge Robert W. Sweet.

Remanded.

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* Pursuant to § 0.14 of the Rules of this Court, this appeal is being determined by Judges Feinberg and Owen, who are in agreement on this opinion. Judge Smith, who heard the argument, unfortunately died on February 16, 1980. Prior to his death, he did not have the opportunity, however, to see this opinion.

** Honorable Richard Owen, District Judge of the Southern District of New York, sitting by designation.

Appendix A

SCOTT G. CAMPBELL, Assistant United States Attorney, New York, N.Y. (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Nathaniel H. Akerman, Gregory L. Diskant, Assistant United States Attorneys, of Counsel), *for Appellant.*

JONATHAN W. LUBELL, New York, N.Y. (Cohn, Glickstein, Lurie, Ostrin, Lubell & Lubell, New York, N.Y., Mary K. O'Melveny, of Counsel), *for Defendant-Appellee.*

FEINBERG, *Circuit Judge:*

After a jury trial before Judge Robert W. Sweet in the United States District Court for the Southern District of New York, Leonard Horwitz was convicted on nine counts of fraud in the sale of securities in violation of 18 U.S.C. §§ 77q(a) and 77(x), one count of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371, and one count of endeavoring to obstruct a grand jury investigation in violation of 18 U.S.C. § 1503. Following his conviction, however, Horwitz moved for a new trial on the ground that he had been denied due process by the prosecutor's refusal to grant use immunity to two defense witnesses whose testimony allegedly would have exculpated Horwitz but who refused to testify on Fifth Amendment grounds. Judge Sweet granted this motion and indicated that at the new trial the testimony by the government's immunized witness, Norman Brodsky, would be suppressed unless the two defense witnesses were also immunized. The government appeals from this order pursuant to 18 U.S.C. § 3731. For the reasons stated below,

we remand the case to the district court for reconsideration of its order.

I

Defendant Horwitz's convictions stem from his participation in the fraudulent operation of the Westchester Premier Theatre (the Theatre), the details of which are set forth at greater length in our related opinion in United States v. Weisman, slip op. 2229 (2d Cir. Apr. 4, 1980). At trial, the government relied primarily on the testimony of three accomplice witnesses, Norman Brodsky, Bruce Kosman and Charles Ross Carino, to prove that Horwitz was guilty of the acts of securities fraud, conspiracy and obstruction of justice alleged in the indictment. All three witnesses had been involved in criminal acts relating to the Theatre's operations, but after being confronted with the government's evidence against them, had begun to cooperate in the ongoing investigation of the Theatre in return for various assurances of leniency. Brodsky, for example, secretly tape-recorded numerous conversations with Horwitz and his co-conspirators and served as the government's chief witness at trial in return for a grant of complete transactional immunity from any criminal liability arising out of his participation in the Theatre's affairs.

The most significant transaction testified to by the government's witnesses involved a scheme by which Horwitz and his co-defendant, Eliot H. Weisman, induced two executives of Warner Communications, Jay Emmett and Solomon Weiss, to cause Warner to purchase $250,000 worth of stock in the Theatre and to give the Theatre $50,000 in return for which Emmett and Weiss received substantial cash payoffs and promises of future secret payments from

the Theatre's revenues. This testimony was supplied primarily by Brodsky. To rebut it, Horwitz moved at the close of the prosecution's case during his first trial, which ended in a mistrial, for a judicial grant of immunity to Warner executives Emmett and Weiss on the ground that their testimony would exculpate Horwitz. Alternatively, Horwitz sought admission into evidence, pursuant to Federal Rule of Evidence 804(b)(5), of the testimony of Emmett and Weiss given before the grand jury investigating the Theatre's operations.[1] Without addressing the immunity request, Judge Sweet denied the motion in an opinion dated December 21, 1978, on the ground that the "interests of justice" did not clearly require the admission under Rule 804(b)(5) of the hearsay grand jury testimony of Emmett and Weiss.

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[1] Rule 804(b)(5) provides in relevant part:

. . . .

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice, will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Appendix A

The first prosecution of Horwitz ended in a mistrial when the jury was unable to reach a verdict. At the second trial, Horwitz subpoenaed Emmett and Weiss, but both witnesses refused to testify on Fifth Amendment grounds. The prosecutor subsequently rejected a suggestion by the district court that Emmett and Weiss be granted a limited use immunity, noting that both executives were the subjects of a continuing investigation. After the jury returned a verdict of guilty on all counts charged, Horwitz moved for a judgment of acquittal or a new trial, arguing, among other things, that he had been denied a fair trial by the government's refusal to immunize Emmett and Weiss.

In a thoughtful opinion, Judge Sweet granted Horwitz's motion for a new trial. See United States v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979). Although expressly rejecting any contention that the prosecution had acted in bad faith, the court concluded that "Horwitz was deprived of due process of law because broad immunity was granted to government witness Brodsky and, to a lesser extent, Kosman, while two witnesses to the events at issue sought to be called by Horwitz were unavailable because of the government's failure to grant them even limited use immunity." Id. at 777. The court observed that a dismissal of the indictment might be warranted to "eliminate the prejudice suffered by Horwitz" but nonetheless settled on the less drastic remedy of granting Horwitz's motion for a new trial, with the condition that "upon such retrial Brodsky's testimony will be excluded unless the requested use immunity is granted to Emmett and Weiss." Id. at 782. It is from this determination that the government now seeks to appeal.

Appendix A

II

Before addressing the merits, we must first confront a question of appealability. The government, obviously aware that the grant of a new trial by itself is nonappealable, see United States v. Alberti, 568 F.2d 617, 620-21 (2d Cir. 1977) sought in its notice of appeal review by this court of "that part [of Judge Sweet's decision] suppressing the testimony of government witness Norman Brodsky because of the Government's refusal to immunize defense witnesses." The government contends that we have jurisdiction to entertain the appeal under 18 U.S.C. § 3731, which provides in pertinent part for interlocutory appellate review of "a decision or order of a district court suppressing or excluding evidence . . . not made after the defendant has been put in jeopardy . . . ." Appellee Horwitz argues, however, that section 3731 is inapplicable because he has not moved for, and the district court has not granted, an order suppressing Brodsky's testimony at the third trial. Horwitz further suggests that such an order may never issue if the government grants use immunity to Emmett and Weiss, or consents to admission of their grand jury testimony at the third trial, or terminates its investigation of the two executives, thereby presumably enabling Emmett and Weiss to testify on behalf of Horwitz.

While we recognize that Horwitz's argument is a substantial one, we nonetheless conclude that this court has jurisdiction under section 3731 to hear the government's appeal. That section expressly provides that its provisions "shall be liberally construed to effectuate its purposes," and those purposes certainly include permitting the government to appeal immediately from adverse pretrial rulings suppressing or excluding evidence. Given this broad

mandate, we do not think that the conditional nature of the district court's ruling, which raises the remote prospect that suppression will not be ordered, necessarily deprives this court of jurisdiction under section 3731 to hear the government's appeal. Indeed, similar arguments in analogous situations have been rejected. See, e.g., *United States* v. *Cannone,* 528 F.2d 296, 298 (2d Cir. 1975) (order providing for exclusion of government witnesses' testimony if government did not disclose names and addresses of witnesses to defense held appealable); *United States* v. *Battisti,* 486 F.2d 961 (6th Cir. 1973) (same). *Cf. United States* v. *Beck,* 483 F.2d 203 (3d Cir. 1973), *cert. denied,* 414 U.S. 1132 (1974) (district court reversal of conviction and remand to magistrate held appealable because "practical effect" of order was to suppress evidence). We likewise conclude that the conditional form of the district court's suppression order will not necessarily deprive this court of appellate jurisdiction under section 3731. Substance, not form, should determine the issue of appealability in this context, and a careful examination of the precise facts is necessary.

The present case well illustrates the need for focusing on the particular facts and the propriety of construing section 3731 liberally. The government, in its briefs on this appeal and before the district court in a pre-third trial hearing, has steadfastly maintained that it will not immunize Emmett and Weiss at a third trial. In the same pretrial hearing, moreover, Judge Sweet noted that if the government sought to introduce Brodsky's testimony without immunizing the Warner executives, he would "in all probability" follow his opinion and grant a defense motion to suppress Broadsky's testimony. And counsel for Horwitz, of course, can be counted on to make such a

motion during the third trial, at which time this court will no longer have jurisdiction to hear an appeal under section 3731. Thus, the government, the defense, and the district court have embarked upon a collision course that will almost certainly result in the suppression of the Brodsky testimony. And if the judge's decision to suppress evidence is incorrect and a judgment of acquittal results, principles of double jeopardy will prevent a government appeal, a situation which section 3731 was designed to prevent. Under the circumstances, it would be an exercise in pure formalism to hold that the district court's order is not appealable at this juncture. Accordingly, we turn to the merits.

III

Prior to the argument of this appeal, another panel of this court was faced with a reverse immunity claim substantially similar to that asserted by appellee Horwitz. That panel, after the argument of this appeal, rejected the reverse immunity claim before it. See United States v. Turkish, slip op. —— (2d Cir. May 27, 1980). The appellant in *Turkish* sought to overturn his conviction on the ground that he was denied due process by the government's failure to grant use immunity to seventeen prospective defense witnesses who, according to appellant, would otherwise refuse to testify. The panel, after an exhaustive analysis of the concept of reverse immunity, concluded that due process considerations of fairness seldom, if ever, require immunization of potential defense witnesses. While not ruling out the possibility that in some extreme situations the government's refusal to grant use immunity to defense witnesses might pose constitutional problems, the panel held that "trial judges should summarily reject

claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution." Id. at ——.[2]

The *Turkish* decision has thus significantly undercut the analytical foundation upon which Judge Sweet's grant of a new trial to Horwitz and conditional suppression of the Brodsky testimony were premised. On the record before us, it seems doubtful that this is one of those rare situations in which the government's refusal to immunize a defendant's witnesses raises serious due process considerations. However, rather than determining ourselves whether Horwitz's claim has merit under the *Turkish* standard, we remand the case to the district court for reconsideration of its suppression order.

Although the suppression order must be reconsidered, Horwitz has also been granted a new trial, and, as previously noted, we are without jurisdiction to review this determination. See *Alberti*, supra, 568 F.2d at 617. However, we would be less than candid if we failed to note that the grant of a new trial was based solely on Horwitz's reverse immunity claim, and if that claim is determined upon remand to be without merit, a new trial will no longer serve any useful purpose. Moreover, it appears that the district court shared this view. In his decision, Judge Sweet noted that "a third trial should not be required unless it is absolutely necessary" and that he took "some comfort" from the fact that the government could appeal the suppression of the Brodsky testimony prior to the

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[2] Judge Lumbard filed a separate opinion in *Turkish*, concurring in the result, but dissenting from that portion of the majority opinion that implied "that under certain circumstances the district court would be under the duty of inquiring into whether or not the prosecution should grant use immunity to a prospective defense witness." Slip op. at ——.

third trial. 476 F. Supp. at 782 & n.17. This language suggests to us that the grant of a new trial was conditional on the affirmance of the reverse immunity claim on appeal. Accordingly, we remand the case to the district court with the suggestion that if Horwitz's reverse immunity claim is found to be untenable in light of *Turkish*, the district judge consider entering a judgment of conviction upon the jury verdict as an alternative to a third trial.[3]

Case remanded for further proceedings consistent with this opinion.

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[3] Horwitz would, of course, have the right to appeal from such a judgment.

Appendix B

(Opinion of District Court)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Cr. 401 (RWS)

Aug. 15, 1979

UNITED STATES OF AMERICA,

Plaintiff,

v.

DE PALMA, ET AL.,

Defendants.

OPINION

SWEET, *District Judge.*

After having been found guilty by jury verdict on all counts with which he was charged,[1] defendant Leonard Horwitz ("Horwitz") moved in timely fashion for a judgment of acquittal pursuant to Rule 29, Fed.R.Crim.P. or, in the alternative, for a new trial pursuant to Rule 33, and for such other relief as might be found appropriate.

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[1] The indictment charged Horwitz as follows: in Count One he was alleged to have conducted the affairs of the Westchester Premier Theatre ("the Theatre") through a pattern of racketeering. In Count Two he was alleged to have conspired to violate Federal securities laws with respect to the sale of stock of the Theatre. In Counts Three through Eleven he was alleged to have defrauded purchasers of Theatre stock. In Count Twenty-four he was alleged to have endeavored to obstruct a Grand Jury investigation.

Appendix B

With the exception of that part of the application dealing with the asserted denial of due process, Horwitz's motions are denied because no significant authorities have been suggested by Horwitz other than those previously considered and ruled upon by the court in connection with his prior motions.

Horwitz has asserted that he was denied due process of law in that he did not receive a fair trial because of the government's selective exercise of its statutory immunity power. In short, Horwitz claims that the government's broad conferral of transactional immunity on key witness and co-conspirator Norman Brodsky ("Brosky") was improper in the face of its refusal to grant even a limited use immunity[2] to potential witnesses Jay Emmett ("Emmett") and Solomon Weiss ("Weiss"), whose testimony would have tended to exculpate Horwitz had they not asserted their Fifth Amendment privilege against self incrimination.[3] Horwitz is entitled to relief on this ground.

Although this is the first occasion on which this issue has been presented in this context, the court has previously

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[2] For definitions of use immunity and transactional immunity *see United States* v. *Morrison*, 535 F.2d 223, 229 (3d Cir. 1976) and *Kastigar* v. *United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 32 L.Ed. 212 (1972). *See also United States* v. *Rocco*, 587 F.2d 144, 147 n. 9 (3d Cir. 1978).

[3] It is important to note what is not at issue here: that the decision to grant immunity is ordinarily within the sole discretion of the prosecutor, *see United States* v. *Wright*, 588 F.2d 31, 35 (2d Cir. 1978); that there is no obligation on the United States Attorney to seek immunity for witnesses, *see United States* v. *Lang*, 589 F.2d 92, 96 (2d Cir. 1978); and that a district court has no independent power to grant immunity to a witness whose testimony a defendant may wish to offer, *see e.g. United States* v. *Jenkins*, 470 F.2d 1061, 1063 (9th Cir. 1973); *In Re Daley*, 549 F.2d 469, 479 (7th Cir. 1977).

issued a written opinion dealing with related questions. See opinion in this action dated December 21, 1978. At the close of the prosecution's case in the first trial (which resulted in a mistrial when the jury was unable to agree on a unanimous verdict) Horwitz moved for a judicial grant of immunity to Emmett and Weiss or for admission into evidence of Emmett and Weiss' grand jury testimony pursuant to Rule 804(b)(5), Fed.R.Evid. In its December 21, 1978 opinion the court denied that motion, noting that it had to consider what was in the "interests of justice," and that one relevant factor was "the use by the government of a grant of immunity to its witnesses and its denial of such a grant to the witnesses sought to be called by Horwitz." December 21, 1978 opinion at 2.[4] At the second trial, Horwitz subpoenaed Emmett and Weiss, who took the stand and on the advice of counsel, invoked their Fifth Amendment privilege. The court inquired of the prosecution whether it would be willing to grant a limited use immunity to Emmett and Weiss on the condition that their testimony be confined to matters highly relevant to material issues. The prosecutor responded in the negative, stating that both witnesses were the subject of a continuing investigation.

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[4] In the cited opinion the court denied, *sub silentio*, Horwitz's motion for a judicial grant of immunity to Emmett and Weiss on the ground that it lacked the power to do so. For authorities supporting this conclusion see footnote 3 hereof. The court also denied Horwitz's motion that Emmett and Weiss' grand jury testimony, which was hearsay, be admitted into evidence pursuant to Rule 804(b)(5), Fed.R.Evid. The basis for this latter decision was that "[t]he complicated interplay of rights, those of the Government, of the defendant Horwitz, and the witnesses who now claim their Fifth Amendment privilege, do not permit a clear enunciation of the interests of justice sufficient to involve the exception of Rule 804(b)(5)." December 21, 1978 opinion at 3.

Appendix B

Horwitz and his co-defendants have, throughout both trials, set forth a number of instances of alleged prosecutorial misconduct other than the government's selective exercise of its immunity power. Indeed, certain admissions of the defendant Eliot Weisman ("Weisman") were suppressed after an improper arrest. As far as Horwitz was concerned, however, the circumstances relating to his arrest and grand jury testimony, the use of Brodsky as a government agent to entrap him, and the publicity given to Emmett's and Weiss' exercise of their privilege, as described above, were all matters which, even collectively, neither rise to the level of prosecutorial misconduct sufficient to provide a ground for the relief herein granted nor compel a finding that the prosecutor acted in bad faith or with a bad intent with respect to Horwitz.[5]

Horwitz was deprived of the due process of law because broad immunity was granted to government witness, Brodsky and, to a lesser extent, Kosman,[6] while two witnesses

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[5] Furthermore, no finding of bad faith or intent on the part of the prosecutor is made by the court in connection with the disposition of this motion.

[6] Although Kosman testified that he thought he had received immunity (see text following footnote 10), this is contradicted by a letter to the court from Assistant United States Attorney Akerman, dated July 9, 1979. This letter indicates that Kosman "received leniency, not immunity, in the form of a plea to a three year felony." The underlying agreement referred to by Mr. Akerman is reflected in a letter dated June 22, 1978 from Mr. Akerman to John Doyle, Esq. (part of the "3500 material" with respect to Kosman). Kosman's testimony indicates that, at least in his own mind, Kosman thought he was testifying pursuant to an immunity grant. Even assuming that Kosman was incorrect in his belief, what is important for present purposes is that the testimony by Kosman was given while he thought immunity had been provided, primarily because that belief may have colored Kosman's testimony.

to the events at issue sought to be called by Horwitz were unavailable because of the government's failure to grant them even limited use immunity.

As indicated in the court's December 21, 1978 opinion, the principal evidence against Horwitz was provided by Brodsky and Kosman.[7] As discussed more fully below, both Brodksy and Kosman were granted immunity,[8] and and the major thrust of their testimony against Horwitz was that Horwitz stated that he had paid money to Emmett and Weiss to induce them to cause Warner Communications, Inc. ("Warner") to purchase shares of stock in the Westchester Premier Theatre ("the Theatre") an inducement which was concealed from the investing public. The unfairness stemming from the government's refusal to grant even a limited use immunity to Emmett and Weiss is brought into relief by reviewing the evidence

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[7] For a discussion of the evidence provided by Carino, see text, *supra*. The evidence against Horwitz brought out by Carino, aside from that provided through Brodsky and Kosman, may not have been sufficient to survive Horwitz's motion pursuant to Rule 29, Fed.R.Crim.P. which was made at the close of the government's case. At any rate, Carino testified that one reason why he decided to cooperate with the federal authorities was "to try to reduce my jail sentence in Virginia and New Jersey." (Transcript at 1090). Part of Carino's plea arrangement was a promise by the government that Carino would not receive more than five years in jail for charges that he was pleading guilty to in New Jersey. Carino testified that he has "no immunity from any crimes that I divulge that come out in this case or any other case," but part of his plea agreement was "that the government will let it be known to anyone that I wish the extent of my cooperation . . ." (Transcript at 1091). Thus, although Carino received no immunity for testifying, his testimony was, at least in part, induced by an expectation of some assistance by the government in ameliorating his sentence.

[8] See footnote 6.

against Horwitz and the government's grant of immunity to its own witnesses.

Brodsky testified that Horwitz was present at a meeting with Ferkoff and Roggen at which $220,000 in cash was presented in a black attache case. The cash was then used, according to Brodsky, to purchase stock in the public offering to enable the Theatre to reach the required minimum of subscriptions to complete the public offering. Brodsky also said that Weisman had told him that Horwitz had contacts at Warner, namely Emmett and Weiss, and that Warner's purchase of Theatre stock during the public offering was related to a $50,000 payoff to those Warner contacts.

According to Brodsky, a complicated set of transactions, briefly here described, involving Horwitz and Warner took place subsequent to the public offering by the Theatre: sometime after June 14, 1973, Horwitz negotiated a transaction which resulted in Warner's purchase of 20,000 shares of Theatre stock in the aftermarket. Horwitz stated that that transaction called for Warner to buy the 20,000 shares at $5 per share and to make an additional $50,000 payment by means of checks. Horwitz allegedly told Brodsky that a problem had arisen in connection with deciding to whose order such Warner checks should be drawn. Brodsky testified that Horwitz told him that it was decided that Warner would pay the $50,000 as follows: (1) a $10,000 check would be made payable to Horwitz; (2) a $10,000 check would be made payable to Kosman or to someone else; and (3) a $30,000 check would be made payable to the Theatre. Regarding the $30,000 check, however, Brodsky testified that Horwitz and he (Brodsky), and possibly Weisman, subsequently decided that it should be made payable to Dennis Konner (Brodsky's law partner) and that in that connec-

tion a bill would be submitted by Konner to Warner. Horwitz allegedly also told Brodsky that in return for causing Warner to purchase the 20,000 shares in the aftermarket, Emmett wanted $20,000 in cash, and Emmett and Weiss wanted additional money to be paid to them at a later date. According to Brodsky, when Horwitz related that the Warner officials wanted the $20,000, Brodsky overdrew his checking account, put the cash in a paper bag, and gave it to Horwitz. The government placed in evidence the checks allegedly cashed by Brodsky in this connection.

Brodsky further testified that when he first discussed the Warner transactions with the government, he mistakenly said that he had been present when Weisman gave Horwitz $50,000 in connection with Warner's original purchase of Theatre stock. Brodsky's recollection was refreshed, so he said, by his viewing certain documents shown to him by the government. Until he saw those documents he had only a hazy recollection of the transaction.

There was also testimony by Brodsky with respect to a request by Horwitz that Brodsky give to Aaron Gottesman $7,500 of a $15,000 debt owed by Brodsky to Horwitz.[9]

Other evidence against Horwitz with respect to the securities counts was provided by Kosman, who worked at the Theatre with Horwitz in group and corporate sales. Kosman testified that Horwitz had told him in 1973 that he (Horwitz) had taken an active role at the Theatre and he (Horwitz) had friends and associates—including Emmett, Gottesman, and others—who bought Theatre stock

[9] The Indictment charged that Gottesman was involved in the securities violations by Horwitz and his co-defendants and that Gottesman received from Horwitz the check for $7,500 in connection with a prior arrangement pursuant to which Gottesman purchased 1,000 shares of Theatre stock for $7,500 during the public offering.

during the public offering. Kosman also gave testimony which tended to corroborate Brodsky's testimony concerning purchases of Theatre stock by Warner in the aftermarket. Kosman also testified that Horwitz had told him that because Malcolm Tarloff, a Connecticut insurance agent, had purchased Theatre stock during the public offering, he would be given an opportunity to sell a life insurance policy on Weisman's life. Finally, Kosman testified about a conversation he had with Horwitz after the public offering, wherein Horwitz stated that he was nervous about Harry Lipsig, who hadn't received certain additional Theatre stock which he had been promised, according to the government at the time of the public offering.

Other evidence against Horwitz on the securities and securities conspiracy counts consisted of (i) testimony by Ross Carino ("Carino") about a conversation, which took place in an automobile in which Horwitz told Carino that he was on his way to an appointment with a Warner official, and that Emmett would probably get involved in having Warner purchase Theatre stock because Emmett needed money; (ii) statements made by Horwitz and recorded by Brodsky; and (iii) certain documents, such as a July 3, 1973 check for $20,000 drawn by Warner and payable to Horwitz.

With respect to the obstruction of justice count, the principal evidence against Horwitz consisted of testimony by Brodsky and tape recordings made by Brodsky. Kosman also testified on the subject as a government witness.

Brodsky testified that in addition to recording his conversations with Horwitz he met with Horwitz at Weisman's suggestion in the fall of 1977 and that Horwitz said that it wasn't his (Horwitz's) place to question Emmett and Weiss's actions in connection with the grand jury in-

vestigation, and that they should keep in close contact so that they could get together on their grand jury stories if something were to happen.

The broad transactional immunity granted to Brodsky, including all crimes which he had committed, whether or not known to the government at the time of the grant, was such that he was induced to become not only a government witness, but also to be an active government agent who taped statements made by Horwitz. Brodsky testified that the government had informed him that in order to secure immunity he would have to wear a body recorder and secure certain evidence while functioning as a government agent. In Brodsky's words, "The government told me that they would need to get Warner Communications and their executives, and after I told them the story about the pay-offs to Warner, they wanted me to be wired to induce Mr. Horwitz to tell me the stories about Warner Communications." (Transcript at 2182). Brodsky added that, of the Warner executives mentioned by the government, the focus "was mostly Jay Emmett." (Transcript at 2183). As a result of these conversations with the government, Brodsky testified he believed that in order to be immunized he would have to tape a conversation of Horwitz describing "what happened with the executives at Warner Communications. . . ." (Transcript at 2183). Brodsky was "willing to go to any lengths to do it." *Id.* Brodsky's incentive for going "to any lengths" became apparent when he was asked on cross examination if the jail terms to which he was exposed by past crimes "could encompass at least a couple of hundred years in jail?", and he replied: "Probably a couple of thousand." (Transcript at 2116).

The plea agreement apparently granted to Kosman was not quite as broad as the immunity given to Brodsky, but

was still significant. Kosman testified that although he was not clear on its precise contours, he did not expect to be prosecuted based on information given in this courtroom, that he would not be prosecuted for crimes relating to the Westchester Premier Theatre, and that the prosecutor would inform the sentencing judge (in an unrelated prosecution) of his cooperation here. (Transcript at 2673, *et seq.* and 2727, *et seq.*).[10]

A review of the grand jury testimony of Emmett and Weiss,[11] for example at pages 31, 32, 87, 98 and 117, and of a December 10, 1978 affidavit submitted by Horwitz's counsel demonstrates that their testimony would have been probative and not cumulative. *Cf. United States* v. *Alessio,* 528 F.2d 1079, 1082 (9th Cir.), *cert. denied,* 426 U.S. 948, 96 S.Ct. 3167, 49 L.Ed.2d 1184 (1976) (defendant not denied a fair trial where testimony sought by defendant would have been cumulative).

Both the government and Horwitz agree that the seminal opinion on this issue is *Earl* v. *United States,* 124 U.S. App.D.C. 77, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921, 87 S.Ct. 2121, 18 L.Ed.2d 1370 (1967), wherein the Chief Justice Warren Burger, then a circuit judge, remarked in a footnote:

> We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for

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[10] See footnote 6 and text accompanying that footnote.

[11] The court reviewed the transcript of this grand jury testimony *in camera* subsequent to the court's *sua sponte* request that Assistant United States Attorney Akerman make it available.

> Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused. . . .

Id. at 534 n. 1. The question posed by the *Earl* court in the above-quoted footnote was raised only hypothetically because the government had not granted immunity to any of its own witnesses.

The Court of Appeals for the Second Circuit has twice referred to the quoted footnote in *Earl* but has not yet been presented with the issue on facts similar to those here. In *United States* v. *Lang,* 589 F.2d 92 (2d Cir. 1978), the court stated that it did not reach the issue because "as in *Earl,* we have no such problem since the Government did not offer immunity to any witness." *Id.* at 96, n. 1. In *United States* v. *Wright,* 588 F.2d 31 (2d Cir. 1978) the Court of Appeals stated: "we do not find it necessary to decide under what circumstances, if any, due process would require the government to confer use immunity on a witness at the request of a defendant." *Id.* at 35. (Footnote omitted). In *Wright* the Second Circuit did not feel compelled to decide "whether the failure to grant immunity denied [defendant] a fair trial," because the defendant "failed to subpoena [the potential witness]" and did not prove "any need for use immunity." *Wright,* 588 F.2d at 36. Unlike *Lang,* the government here did offer immunity to its own witnesses. Unlike *Wright,* the defendant here did subpoena the potential witnesses, did show the need for use immunity, and did call Emmett and Weiss to the

stand so as to make certain that they would assert their right against self-incrimination.

The Second Circuit, in *Wright,* noted that other courts which have addressed the issue here presented have "reached a variety of results." 588 F.2d at 35 n.3. For example, the Court of Appeals for the Ninth Circuit has suggested that when the government relies on the testimony of immunized witnesses, fundamental fairness may require a grant of immunity for defense witnesses. *Alessio, supra,* 528 F.2d at 1081-82.[12] *See also United States* v. *Bautista,* 509 F.2d 675, 677 (9th Cir. 1975); *United States* v. *Jenkins,* 470 F.2d 1061, 1064 (9th Cir. 1972). The Court of Appeals for the Third Circuit has recently indicated that a conviction may be overturned on the ground asserted by Horwitz, although the court indicated that the evidentiary showing required in order for a court to reach that result must be "substantial." *United States* v. *Herman,* 589 F.2d 1191, 1204 (3d Cir. 1978).[13] *See also United States* v. *Morrison,* 535 F.2d 223, 229 (3d Cir. 1976) (distinguish-

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[12] The *Alessio* court remarked:

> Of course, whatever power the government possesses may not be exercised in a manner which denies the defendant the due process guaranteed by the Fifth Amendment. The footnote in *Earl* v. *United States, supra,* on which appellant relies heavily says no more than this. The key question, then, is whether appellant was denied a fair trial because of the government's refusal to seek immunity for defense witnesses. 528 F.2d at 1082.

[13] The Third Circuit went on to state: "The defendant must be prepared to show that the government's decisions were made with the deliberate intention of distorting the judicial fact finding process." *Herman,* 589 F.2d at 1204 (citations omitted). This court expresses no view concerning the general standard to be applied in determining whether a defendant has met his burden in asserting a claim on the ground discussed in this opinion. On the peculiar facts of this case, however, the court concludes that such burden has been met by Horwitz.

able from the instant case because of the presence of prosecutorial misconduct independent of the failure to grant immunity); *United States* v. *LaDuca*, 447 F.Supp. 779, 786-87 (D.N.J.) (Stern, J.), *aff'd. sub nom. United States* v. *Rocco*, 587 F.2d 144 (3d Cir. 1978).

[1,2] Central to the issue here presented is the question of what obligation is placed upon the government in connection with the search for truth in a criminal proceeding. While the government need not in every circumstance grant immunity to potential defense witnesses, here, where the foundation of the government's case against Horwitz was built by means of a far-reaching immunity grant, and where the evidence sought by the defense is affected by the government's continuing investigation of the potential defense witnesses, the denial of limited use immunity resulted in an unfair trial.

The issue of appropriate relief is, however, as troublesome as the constitutional issue already discussed. The alternatives to be considered in light of *United States* v. *Brown*, 602 F.2d 1073 (2d Cir. 1979), and other authorities are: (1) dismissal of the indictment[14] or (2) a retrial excluding the Brodsky testimony unless the government grants Emmett and Weiss the requested use immunity.[15]

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[14] One issue that does not raise a problem, however, is double jeopardy. The decision to dismiss an indictment can be reviewed, *see United States* v. *Wilson*, 420 U.S. 332, 352-53, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975), because if it is found that the government's actions were not violative of defendant's due process rights, the earlier verdict can be reinstated. Since such an order would not subject defendant to a second trial for the same offense, there would be no double jeopardy.

[15] Horwitz's motion for acquittal under Rule 29, Fed.R.Crim.P., must be denied. Upon a motion for acquittal, if there is no evidence upon which a reasonable mind might fairly find guilt beyond a reasonable doubt, the motion must be granted. *United*

[3] Dismissal of an indictment "must be reserved for extremely rare cases." *United States* v. *Broward,* 594 F.2d 345, 351 (2d Cir. 1979). The remedy is justified:

> in order to achieve one or both of two objectives: first, to eliminate prejudice to a defendant in a criminal prosecution; second, to "help to translate the assurances of the United States Attorneys into consistent performances by their assistants."

United States v. *Fields,* 592 F.2d 638, 647 (2d Cir. 1978), *cert. denied,* —— U.S. ——, 99 S.Ct. 2838, 61 L.Ed.2d 284 (1979).

Dismissal of the indictment here would seem to satisfy the first of these objectives. The prejudice resulting to the defendant from the prosecutor's selective grant of immunity has been described. Moreover, this is not the type of situation recently considered in *United States* v. *Brown, supra,* in which "the most that can be said in support of the dismissal of the indictment . . . is that the government's case against Brown was suprisingly weak." at 1077. Rather, because of the manner in which immunity was granted, Horwitz was deprived of his due process rights, including his right to put any witness on the stand who was "capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Washington* v. *Texas,* 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1919 (1967).[16]

States v. *DeGarces,* 518 F.2d 1156, 1159 (2d Cir. 1975); *United States* v. *Taylor,* 464 F.2d 240, 243 (2d Cir. 1972). A review of the evidence reveals that in this case, a reasonable mind could conclude that Horwitz is guilty beyond a reasonable doubt and, of course, the jury did so conclude.

[16] This necessarily includes the right to have witnesses testify regarding the absence of certain occurrences.

As noted, the dismissal of the indictment also might be used to deter a pattern of official misconduct but there has been no showing of any pattern outside of the confines of this action, in which the government's postion has remained consistent during both trials. Nevertheless, it is noted that there is no indication that the government intends voluntarily to abandon its practice of selectively granting immunity, at least in this proceeding.

[4] Although this court believes that dismissal of the indictment is warranted to eliminate the prejudice suffered by Horwitz, it is aware that this sanction is "the most drastic remedy." *United States* v. *Fields,* 592 F.2d at 647 (emphasis in original), and is to be used only "in the rare case, where it is impossible to restore a criminal defendant to the position that he would have occupied vis-a-vis the prosecutor." *Id.* at 648. In *United States* v. *Brown, supra,* the Court of Appeals recently noted that the prejudice to the defendant there was not of the type that should be cured by dismissal of the indictment. Rather, it suggested that the proper remedy would be suppression of the evidence during a new trial. slip op. at 3708.

[5] Because the constitutional defect can be remedied, Horwitz's motion for a new trial is granted, and upon such retrial Broadsky's testimony will be excluded unless the requested use immunity is granted to Emmett and Weiss. The motion for a new trial is granted with much reluctance, because Horwitz has already endured two lengthy, costly trials and a third trial should not be required unless it is absolutely essential.[17] However, because the

[17] This court takes some comfort, however, from the knowledge that the government may appeal a decision to suppress the Brodsky evidence prior to the third trial. *See* 18 U.S.C. § 3731.

"interests of justice" are insufficient reason for dismissing an indictment, *United States* v. *Lai Ming Tanu,* 589 F.2d 82, 86 (2d Cir. 1978), and because it appears that these interests would best be served by a third trial with immunized testimony by witnesses from *both* sides, Horwitz's motion for a retrial is granted.

Appendix C

(Opinion of Court of Appeals, May 27, 1980)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 608, 795—September Term, 1979

(Argued: January 15, 1980 Decided: May 27, 1980.)

Docket Nos. 79-1326, 79-1396

UNITED STATES OF AMERICA,

Appellee,

—v.—

NORMAN TURKISH,

Defendant-Appellant.

Before:

LUMBARD, MANSFIELD and NEWMAN,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York (Vincent L. Broderick, Judge), convicting appellant after jury trial of income tax and conspiracy offenses in violation of 26 U.S.C. 7201, 7206 and 18 U.S.C. 371.

Affirmed.

RONALD PODOLSKY, New York, N.Y., *for defendant-appellant.*

Appendix C

ALLEN R. BENTLEY, Asst. U.S. Atty., New York, N.Y. (Robert B. Fiske, Jr., U.S. Atty., Gregory L. Diskant, Asst. U.S. Atty., New York, N.Y., on the brief), *for appellee.*

NEWMAN, *Circuit Judge:*

This criminal appeal concerns primarily the issue of whether a defendant is entitled to have immunity conferred upon defense witnesses who invoke their privilege against self-incrimination. The appeal is brought by Norman Turkish, who was convicted by a jury in the Southern District of New York (Vincent L. Broderick, Judge) of evading income taxes and filing false income tax returns, 26 U.S.C. 7201, 7206, and conspiring to defraud the United States, 18 U.S.C. 371. The trial of Turkish and three co-defendants lasted 11 weeks. Turkish and one co-defendant were found guilty; only Turkish appeals.

The Government's evidence established that Turkish was a principal participant in a scheme that used fraudulent means to enable C.R. Rittenberry & Associates, Inc., an oil company, to create artificial tax losses in one year, offset by equally artificial taxable gains in a subsequent year, thereby postponing for a year the taxes on millions of dollars of corporate income. The scheme involved the use of tax "straddles," the simultaneous purchase and sale at different prices of equal numbers of commodity futures contracts to be performed in different months. In the normal use of tax straddles, opportunities for arguably lawful tax avoidance are created when the market price varies from the prices at which the original contracts were both bought and sold. If the market declines, the trader offsets his purchase with an equivalent sale, thereby locking in a

tax loss on his original purchase. He then offsets his original sale contract with an equivalent purchase, thereby locking in an approximately equal profit on his original sale contract. He benefits when the profit is taxable in the year following realization of the loss. In normal transactions the trader takes the risk that market price movements will be too narrow to create much opportunity for tax postponement and also the more serious risk that prices will not move uniformly with respect to both his original contracts. In the latter event the profit available to be locked in may be less than the locked-in loss. Turkish and others avoided these risks by fraudulently manipulating virtually the entire business of one trading ring on the New York Cotton Exchange, the Crude Oil Futures Market. This enabled them to move prices up and down at will, so that Rittenberry could take short-term capital losses during one tax year and defer an equal amount of off-setting capital gain to a subsequent year, all with no risk and a considerable saving in the postponement of taxes. Turkish not only orchestrated the fraudulent aspects of the scheme but also evaded taxes on the money he received as compensation for his role.

I.

The Indictment

Turkish contends that his conviction should be reversed because the conspiracy count of the indictment (Count One) did not charge an offense and was unconstitutionally vague. The conspiracy count alleged that Turkish and others conspired to "defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury in the collection

of income taxes." The crime of conspiring to defraud the United States, 18 U.S.C. 371, includes acts that "interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery," *Hammerschmidt* v. *United States,* 265 U.S. 182, 188 (1924). The creation of artificial tax losses for a business by fraudulent manipulation of prices in a commodity market qualifies as such an act. Turkish contends that there would have been no crime had the oil company not taken the resulting losses as tax deductions. Even if the manipulation of prices was not, by itself, a federal offense, it became evidence of a federal offense when it was done to avoid federal taxes. The Government alleged that Turkish's activities on the Crude Oil Futures market were part of a conspiracy that involved other acts, not that these activities constituted the entirety of the crime.

The indictment is also sufficiently precise to meet the requirements of the Constitution and the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 7(c) states, in part: "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Count One specified Turkish's alleged efforts to manipulate the Crude Oil Market in order to create tax losses for his co-defendant's client. This was sufficient to inform him of the charges against him, and to enable him to prepare his plea and his defense accordingly. See *Hamling* v. *United States,* 418 U.S. 87, 117 (1974).

II.

Defense Witness Immunity

The claim for defense witness immunity arose in the following circumstances. The Government presented its

case by calling a number of witnesses involved in the fraudulent transactions, several of whom were co-conspirators. Of these, three had pleaded guilty to participation in the conspiracy and had received letter agreements that they would not be prosecuted for any other commodity market crimes or related tax offenses if they testified truthfully. Two other prosecution witnesses who had not been indicted received similar letters, one of which was sufficient to persuade its recipient to return from Switzerland for the trial. In addition, one prosecution witness was formally granted "use" immunity under 18 U.S.C. 6002.

During the trial, and after the Government had concluded its case, Turkish and his co-defendants moved that seventeen of the prospective defense witnesses be granted "use" immunity and required to testify under 6002. They argued that these witnesses could provide exculpatory testimony, but would invoke their Fifth Amendment privilege and decline to testify unless compelled to do so. Judge Broderick invited the Government to consider granting "use" immunity to these witnesses pursuant to 6002. The Government did consider the matter, but decided not to grant immunity. Judge Broderick then reserved decision on defendant's motion until after the trial, at which time the defendants moved for a new trial or acquittal. On August 23, 1979, Judge Broderick denied the defendants' motion.

In a subsequent opinion, *United States* v. *Turkish*, —— F. Supp. —— (S.D.N.Y. 1979), Judge Broderick set forth his analysis of the issue and his reasons for denying the motion. Judge Broderick concluded that the Compulsory Process Clause of the Sixth Amendment does not give a defendant the right to require immunization of a witness, but that such a right is "probably" contained in the Due

Process Clause of the Fifth Amendment. *Id.* at ——. However, he declined to accord the defendants the benefit of this "probable" Fifth Amendment right to defense witness immunity for two reasons. First, he ruled that the defendants' motion was untimely, since it should properly have been made at the beginning of the trial. Second, he concluded that defense witness immunity would be available only to secure testimony that was material and exculpatory and that the defendants had not shown that any of the witnesses for whom they sought immunity would give material, exculpatory testimony.

To assess Turkish's challenges to these rulings we deem it appropriate to explore the concept of defense witness immunity, a matter arising with increasing frequency before this and other courts. See, *e.g.*, *United States* v. *De Palma,* 476 F. Supp. 775 (S.D.N.Y. 1979), *appeal pending sub nom. United States* v. *Horwitz,* No. 79-1315 (2d Cir.); *Government of the Virgin Islands* v. *Smith,* —— F.2d —— (3d Cir. Feb. 5, 1980).

Granting immunity to a defense witness at the defendant's request seems to have been considered for the first time, in a reported decision, by Chief Justice Burger, then a Circuit Judge, as dictum in *Earl* v. *United States,* 361 F.2d 531, 534 n.1 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967). Since then, it has been much discussed by courts and commentators.[1] Interest in defense witness immunity

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[1] The commentators have generally been favorable to the notion of reverse immunity. *See* Westen, *Compulsory Process,* 73 Mich. L. Rev. 71 (1974); Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses,* 67 Colum. L. Rev. 953 (1967); Note, *Separation of Powers and Defense Witness Immunity,* 66 Geo. L.J. 51 (1977); Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses,* 91 Harv. L. Rev. 1266 (1978); Note, *A Re-Examination of Defense Immunity: A*

was considerably heightened after Congress enacted the "use" immunity statute, 18 U.S.C. 6001-6005, in 1970, and the Supreme Court subsequently upheld its constitutionality, *Kastigar* v. *United States* 406 U.S. 441 (1972). No longer did an immunity grant forbid prosecution of the witness for crimes referred to in his testimony ("transactional" immunity). Now the Government could still prosecute the witness; it was barred only from making any use of his immunized testimony, either directly by putting the testimony in evidence at the witness's trial, or indirectly by obtaining other evidence from leads that the testimony supplied.

Claims for defense witness use immunity have been uniformly rejected by this Court, *United States* v. *Gleason,* —— F.2d —— (2d Cir. Dec. 19, 1979); *United States* v. *Praetorius,* —— F.2d —— (2d Cir. Dec. 10, 1979), *modified on rehearing,* —— F.2d —— (2d Cir. May 7, 1980); *United States* v. *Lang,* 589 F.2d 92, 96 n.1 (2d Cir. 1978); *United States* v. *Wright,* 588 F.2d 31, 33-37 (2d Cir. 1978), *cert. denied,* 440 U.S. 917 (1979); *United States* v. *Stofsky,* 527 F.2d 237, 249 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976); see also *United States* v. *Housand,* 550 F.2d 818, 823-824 (2d Cir.), *cert. denied,* 431 U.S. 970 (1977), and by almost all circuits to consider the matter, *United States* v. *Lenz,* —— F.2d —— (6th Cir. Mar. 10, 1980); *United States* v. *Smith,* 542 F.2d 711, 715 (7th Cir. 1976); *United States* v. *Alessio,* 528 F.2d 1079, 1081-82 (9th Cir.), *cert. denied,* 426 U.S. 948 (1976); *Thompson* v. *Garrison,* 516 F.2d 986, 988 (4th Cir.), *cert. denied,* 423 U.S. 933 (1975);

New Use for Kastigar, 10 Harv. J. Legis. 74 (1974); Note, *The Public Has a Claim to Every Man's Evidence: The Defendant's Constitutional Right to Witness Immunity,* 30 Stan. L. Rev. 1211 (1978).

see *Earl* v. *United States,* 361 F.2d 531 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967) (transactional immunity). The claim is a matter of divided opinion in the Third Circuit, compare *United States* v. *Rocco,* 587 F.2d 144 (3d Cir. 1978); *United States* v. *Berrigan,* 482 F.2d 171 (3d Cir. 1973), with *Government of the Virgin Islands* v. *Smith, supra; United States* v. *Herman,* 589 F.2d 1191, 1203-04 (3d Cir. 1978), *cert. denied,* 442 U.S. 913 (1979); *United States* v. *Morrison,* 535 F.2d 223 (3d Cir. 1976). Additional support for the claim has been expressed by the former Chief Judge of the District of Columbia Circuit, see *United States* v. *Gaither,* 539 F.2d 753 (D.C. Cir.) (Bazelon, C.J., concurring in denial of rehearing en banc); *cert. denied,* 429 U.S. 961 (1976), *United States* v. *Leonard,* 494 F.2d 955, 985 n.79 (D.C. Cir. 1974) (Bazelon, C.J., concurring and dissenting), and by two District Courts, *United States* v. *De Palma, supra,* and *United States* v. *La Duca,* 447 F. Supp. 779 (D.N.J. 1978), *aff'd on other grounds sub nom. United States* v. *Rocco, supra,* in addition to Judge Broderick in this case.

The only federal appellate decisions ruling in favor of defense witness immunity appear to be the Third Circuit decisions in *Morrison* and *Smith.* In *Morrison* a divided panel of the Third Circuit reversed a conviction on the ground that prosecutorial misconduct had caused a defense witness to withhold testimony out of fear of self-incrimination. As a remedy for the misconduct, the Court ordered that upon a retrial, the Government face the choice of either granting the witness use immunity or having the defendant acquitted.

Smith involved a totally bizarre situation. A juvenile defendant sought use immunity for a juvenile defense wit-

ness. The office of the Virgin Islands Attorney General, who had exclusive jurisdiction to prosecute both the defendant and the witness, was agreeable to use immunity for the witness. However, this local prosecuting office, as a matter of "prosecutorial courtesy," —— F.2d ——, conditioned its approval upon the consent of the United States Attorney, who inexplicably declined to consent. In a thoughtful opinion Judge Garth reversed the conviction and remanded for determination of whether use immunity should have been conferred under standards explicated in the Court's decision.

These standards rest on two different concepts. First, Judge Garth considered the power of a court to order the prosecutor to grant statutory use immunity pursuant to 18 U.S.C. 6002. Such "statutory" immunity was held to be available for a defense witness with relevant testimony, —— F.2d at —— n.7, when the defendant could show that the prosecutor's decision not to confer immunity was made "with the deliberate intention of distorting the judicial fact finding process," *id.* at ——, a standard the Third Circuit had previously articulated in *United States* v. *Herman, supra,* 589 F.2d at 1204. Secondly, Judge Garth considered what he called "judicial" immunity, the power of a court, unaided by statute, to order that a witness's testimony cannot be used against him. Again applying a standard earlier announced in *United States* v. *Herman, supra,* Judge Garth held that judicial immunity, *i.e.*, court-ordered use immunity, was available for a witness "capable of providing clearly exculpatory evidence" when the Government can present no "strong countervailing interest." —— F.2d at ——.

Though *Morrison* and *Smith* stand in sharp contrast to the uniform holdings of other federal appellate decisions

that have rejected defense witness immunity, some of these decisions have been careful to deny the claim only with respect to the precise facts presented, *e.g.*, *United States* v. *Wright, supra; United States* v. *Alessio, supra.* Furthermore, two of our decisions have explicitly left open the possibility that defense witness immunity might be required if grants of use immunity to prosecution witnesses resulted in an "unfair advantage." *United States* v. *Gleason, supra,* —— F.2d at ——; *United States* v. *Lang, supra,* 589 F.2d at 96-97. In light of this state of the case law, further consideration of the constitutional bases for defense witness immunity is warranted. Resort is usually made to the Sixth and Fifth Amendments.

The established content of the Sixth Amendment does not support a claim for defense witness immunity. Traditionally, the Sixth Amendment's Compulsory Process Clause gives the defendant the right to bring his witness to court and have the witness's non-privileged testimony heard, but does not carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination. *United States* v. *Lacouture,* 495 F.2d 1237 (5th Cir.), *cert. denied,* 419 U.S. 1053 (1974); *Myers* v. *Frye,* 401 F.2d 18 (7th Cir. 1968); *Johnson* v. *Johnson,* 375 F. Supp. 872 (W.D. Mich. 1974); *Holloway* v. *Wolff,* 351 F. Supp. 1033 (D. Neb. 1972); see *Royal* v. *Maryland,* 529 F.2d 1280, 1283 (4th Cir. 1976) (Winter, J., dissenting). While the prosecutor may not prevent or discourage a defense witness from testifying, *Washington* v. *Texas,* 388 U.S. 14 (1967); *United States* v. *Morrison, supra,* it is difficult to see how the Sixth Amendment of its own force places upon either the prosecutor or the court any affirmative obligation to secure testimony from a defense witness by replacing the protection of the

self-incrimination privilege with a grant of use immunity.

Arguably there is a more plausible basis for defense witness immunity in the more general and perhaps developing requirement of basic fairness protected by the Fifth Amendment's Due Process Clause.[2] The appeal to constitutionally protected fairness proceeds from two basic arguments. First, as this Circuit hinted in *Gleason* and *Lang,* unfairness may inhere in some situations because the Government's grant of use immunity to its witnesses affords it an advantage over the defendant's ability to present a defense. Secondly, to the extent that a trial is viewed as a search for the truth, denial of defense witness immunity may in some circumstances unfairly thwart that objective.[3]

The first contention, based on equalizing the powers of the prosecution and the defense, is entirely unpersuasive. A criminal prosecution, unlike a civil trial, is in no sense a symmetrical proceeding. The prosecution assumes substantial affirmative obligations and accepts numerous restrictions, neither of which are imposed on the defendant. The prosecution must prove the defendant's guilt beyond a reasonable doubt to the satisfaction of all the jurors; it may not obtain the defendant's testimony, suppress exculpatory evidence, nor retry the defendant after acquit-

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[2] Defense witness immunity, a concept first developed only in the 1960s, and regarded as plausible only since the passage of the use immunity statute, cannot qualify as a due process right on any theory that it is part of the "compelling traditions of the legal profession." *Rochin* v. *California,* 342 U.S. 165, 171 (1952).

[3] We put to one side the situation, illustrated by *United States* v. *Morrison, supra,* where a court uses the option of defense witness immunity as part of a remedy for prosecutorial misconduct directed at the witness. There is no claim in this case of any such misconduct.

tal, even though errors prejudicial to the Government occurred. The defendant, by contrast, may prevail without offering any proof at all; he need not disclose whatever inculpatory evidence he discovers, may avoid conviction by persuading a single juror that reasonable doubt exists, and may challenge a conviction by direct appeal and subsequent collateral attack.

The system of criminal law administration involves not only this procedural imbalance in favor of the defendant, but also important aspects of the Government's law enforcement power that are not available to the defendant. Subject to constitutional and statutory limits, the Government may arrest suspects, search private premises, wiretap telephones, and deploy the investigative resources of large public agencies. Few would seriously argue that the public interest would be well served either by extending all of these powers to those accused of crime or by equalizing the procedural burdens and restrictions of prosecution and defendant at trial. Viewed in isolation, there is a surface appeal to the equal availability of use immunity for prosecution and defense witnesses. But in the context of criminal investigation and criminal trials, where accuser and accused have inherently different roles, with entirely different powers and rights, equalization is not a sound principle on which to extend any particular procedural device. At a minimum, such a principle will not support a constitutional interpretation of Fifth Amendment fairness.

The second argument, based on the need to pursue the truth, has somewhat greater force. As a general rule the Government is properly obliged to divulge exculpatory evidence. *Brady* v. *Maryland*, 373 U.S. 83 (1963). That

principle, however, has heretofore been limited to evidence in the Government's possession and has not been extended to create a Government obligation to assist the defense in extracting from others evidence the Government does not have. Moreover the concept of a trial as a search for the truth has always failed of full realization whenever important facts are shielded from disclosure because of a lawful privilege. The key fact needed to prove a defendant's innocence may be contained in a client's privileged admission to his attorney, or a husband's privileged admission to his wife, as well as in the testimony of a witness protected by the privilege against self-incrimination. Nevertheless, it must be acknowledged that since the advent of immunity statutes, the self-incrimination privilege, unlike any other, can be displaced without any impairment of the legally protected rights of the holder of the privilege. And unlike transactional immunity, use immunity does not improve the legal position of the holder of the privilege; it leaves his legal rights precisely as they were before he testified. However, the grant of use immunity does implicate public interests, and any assessment of a claim for defense witness use immunity must reckon with those public concerns.

In the first place, while the prosecution remains theoretically free under *Kastigar* to prosecute a witness granted use immunity, the obstacles to a successful prosecution can be substantial. The Government has a "heavy burden" to prove that its evidence against the immunized witness has not been obtained as a result of his immunized testimony. *Kastigar* v. *United States, supra,* 406 U.S. at 461. While this burden can be met by cataloguing or "freezing" the evidence known to the Government prior to the immunized

testimony, that technique is not available when continuing investigations disclose vital evidence after, though not resulting from, the immunized testimony. See *SEC* v. *Stewart,* 476 F.2d 755, 762 (2d Cir. 1973) (Timbers, J., dissenting). Moreover, to meet its burden of proving that prosecution of the immunized witness was not benefitted in any way by his immunized testimony the prosecutors most knowledgeable about an investigation may in some circumstances be obliged to forgo any further contact with the witness and arrange for a new team of investigators and prosecutors to pursue the case against him. See *United States* v. *Kurzer,* 534 F.2d 511 (2d Cir. 1976).

Secondly, awareness of the obstacles to successful prosecution of an immunized witness may force the prosecution to curtail its cross-examination of the witness in the case on trial to narrow the scope of the testimony that the witness will later claim tainted his subsequent prosecution. While the witness cannot prevent prosecution and secure an immunity "bath" by broadening the scope of his answers, as he could if testifying under a grant of transactional immunity, his fulsome answers may substantially lessen the likelihood of any successful prosecution.

Finally, there is considerable force to the Government's apprehension that defense witness immunity could create opportunities for undermining the administration of justice by inviting cooperative perjury among law violators. Co-defendants could secure use immunity for each other, and each immunized witness could exonerate his co-defendant at a separate trial by falsely accepting sole responsibility for the crime, secure in the knowledge that his admission could not be used at his own trial for the substantive offense. The threat of a perjury conviction, with penalties frequently far below substantive offenses, could

not be relied upon to prevent such tactics. Moreover, this maneuver would substantially undermine the opportunity for joint trials, with consequent expense, delay, and burden upon disinterested witnesses and the judicial system.

How these substantial concerns are to be weighed against the defendant's interest in securing truthful exculpatory testimony through defense witness immunity turns in large part upon whether the balancing of these interests is appropriately a judicial function. The Government suggests it is not, contending that the granting of immunity is preeminently a function of the Executive Branch. See *Ullman* v. *United States,* 350 U.S. 422 (1956). On the other hand, the judiciary has constitutional responsibilities for the fairness of a trial. Moreover, as Judge Garth has argued in *Smith,* the court can accord use immunity without directly acting in the domain of either the Legislative or Executive Branch. A court can rule that testimony may not be used against a witness without adding any gloss to the use immunity statute or directing the prosecutor to use his statutory authority. Judicially created use immunity, albeit premised on constitutional considerations, was fashioned by the Supreme Court in *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U.S. 52 (1964) (witness's compelled testimony barred from use by another jurisdiction), and in *Simmons* v. *United States,* 390 U.S. 377 (1968) (defendant's testimony at suppression hearing barred from use at trial). See also *In re Grand Jury Investigation,* 587 F.2d 589 (3d Cir. 1978) (testimony given to assert Speech and Debate Clause defense); *United States* v. *Immon,* 568 F.2d 326 (3d Cir. 1977) (testimony given to assert Double Jeopardy Clause defense).

However, a court cannot determine whether any constitutional provision requires a judicial grant of use im-

munity without assessing the implications upon the Executive Branch, both those that flow from a grant of use immunity and those that flow from an adjudication of whether such immunity might be appropriate in a particular case. The concerns previously expressed about the risk to other successful prosecutions are matters normally better assessed by prosecutors than by judges. Surely a court is in no position to weigh the public interest in the comparative worth of prosecuting a defendant or his witness, although if a court decides that immunity is required, it can always leave that ultimate assessment with the prosecutor by advising that trial of the defendant will continue only if the witness's testimony is immunized. But confronting the prosecutor with a choice between terminating prosecution of the defendant or jeopardizing prosecution of the witness is not a task congenial to the judicial function.[4]

Still it may be contended, as Judge Garth did in *Smith*, that a court ought to determine in each case whether the

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[4] We do not regard the limited immunity judicially created for the defendant in *Simmon* v. *United States*, *supra*, to be analogous to use immunity for a witness. In *Simmons* the Supreme Court ruled that a defendant's testimony at a suppression hearing, presented to establish standing to assert a Fourth Amendment claim, could not be introduced at trial. The Court focused on exclusion of the defendant's testimony, and did not mention creation of formal use immunity, *i.e.*, prohibition against using testimony or any leads from it. Perhaps that was the implicit result of the decision, but, even if so, immunization of a statement concerning Fourth Amendment standing carries very little risk of impeding prosecution of the defendant for the substantive offense. Furthermore, *Simmons* creates an immunity to avoid the dilemma of a defendant's choosing between vindicating his Fourth Amendment right or maintaining his self-incrimination privilege at trial. Nothing comparable is presented when a defendant finds that evidence he hoped to present is unavailable because other persons prefer to assert their own privilege.

risks to the public interest in conferring defense witness immunity outweigh the needs of the defendant. *Smith* suggests two types of inquiry: whether the prosecutor's opposition to defense witness immunity stems from "the deliberate intention of distorting the fact finding process," —— F.2d ——, or whether the prosecutor can present "strong countervailing interest," *id.* at ——, to the defendant's need for clearly exculpatory evidence. Either inquiry will propel a trial court into uncharted waters. Focusing upon the prosecutor's intent will often lead to exploration and premature disclosure of the pending status of an investigation against the witness. Moreover, a prosecutor without enough evidence to seek indictment of a witness may legitimately prefer to maintain his option to prosecute on the basis of later information. It cannot fairly be argued, where the prosecutor declines to consent to use immunity, that the absence of present intention to prosecute is evidence of intention to distort the fact-finding process. Alternatively, weighing the "countervailing interest" in not granting defense witness immunity will in all likelihood prove to be as elusive a task as formulating any meaningful standards for the assessment. In the extraordinary fact situation presented by the *Smith* case, where the prosecutor opposing use immunity does not even have jurisdiction to prosecute the witness, the public interest in not granting defense witness immunity appears to be non-existent. But in most situations where defense witness immunity is likely to be sought, some legitimate opposing prosecution interest will exist, and constitutional fairness is not a satisfactory standard against which to assess such interests.

When any novel legal proposition is urged upon a court, there is a natural judicial reluctance to say "never." In-

deed, the extraordinary fact situation presented by the *Smith* case illustrates a situation where denial of defense witness immunity can be said to deny the defendant the fair trial guaranteed by the Due Process Clause. Yet it is important to recognize that *Smith* really does not involve a use of the Due Process Clause to balance the public interest in withholding immunity against the defense need for it. In *Smith* the prosecutor with jurisdiction over the witness was willing to grant use immunity. Opposition came from a prosecutor without jurisdiction. This was simply an instance of a prosecutor interfering, for no apparent reason, to suppress evidence that was about to become available to the accused. We have no dispute with the holding in *Smith*. However, in light of all the considerations previously discussed, we find ourselves in fundamental disagreement with the standards outlined in that decision. Without precluding the possibility of some circumstances not now anticipated, we simply do not find in the Due Process Clause a general requirement that defense witness immunity must be ordered whenever it seems fair to grant it. The essential fairness required by the Fifth Amendment guards the defendant against overreaching by the prosecutor, *Giglio* v. *United States*, 405 U.S. 150 (1972) (failure to disclose promise not to prosecute government witness); *Waley* v. *Johnston*, 316 U.S. 101 (1942) (threat to use manufactured evidence); *Taylor* v. *Lombard*, 606 F.2d 371 (2d Cir. 1979) (knowing use of perjured testimony); *United States* v. *Westbo*, 576 F.2d 285 (10th Cir. 1978) (disobedience of court ruling excluding admission of other crimes evidence); *cf. Santobello* v. *New York*, 404 U.S. 257 (1971) (repudiation of plea bargain promise), and insulates him against prejudice. See,

e.g., Ward v. *Village of Monroeville,* 409 U.S. 57 (1972) (judge had pecuniary interest in result); *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966) (trial subject to excessive publicity); *Turner* v. *Louisiana,* 379 U.S. 466 (1965) (prosecution witnesses present in jury room during deliberations); *In re Murchison,* 349 U.S. 133 (1955) (judge also served as one-person grand jury); *Moore* v. *Dempsey,* 261 U.S. 86 (1923) (trial occurred under threat of mob violence). It does not create general obligations for prosecutors or courts to obtain evidence protected by lawful privileges.

The circumstances of this case do not remotely approach a situation where lack of defense witness immunity could be found to deny constitutionally protected fairness. In the first place, the demand for immunity was initially made in the middle of the trial and properly found to be untimely by Judge Broderick for reasons set out in the margin.[5] See *United States* v. *Taylor,* 562 F.2d

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[5] Judge Broderick's detailed findings were as follows:

Some 171 days elapsed between the first pre-trial conference herein and the beginning of trial. Defendants were aware that the government's investigation of the crude oil market was continuing during this period; this very fact was argued to me by defense counsel in seeking a substantial adjournment of the original date. Yet it was never drawn to my attention during this period that defendants had any intention of requesting immunization of witnesses. The crude oil investigation was initiated in the New York County District Attorney's office, and the investigation was conducted by Assistant District Attorney Michael F. Baumeister of that office and by Assistant United States Attorney Paul Vizcarrondo for the United States Attorney. These two men jointly represented the government in all pre-trial proceedings in this case, and they jointly presented the government's case at trial. The case was a complicated one, involving the complex organization and operations of the commodities futures market. Once trial began the full time of the two government attorneys, Baumeister

1345, 1361 (2d Cir.), *cert. denied,* 432 U.S. 909 (1977); *United States* v. *Jones,* 487 F.2d 1308, 1311 (7th Cir.), *cert. denied,* 409 U.S. 858 (1972). Secondly, Judge Broderick carefully considered the expected testimony of the witnesses sought to be immunized and concluded that none of them would provide material, exculpatory evidence. Their testimony would either have been cumulative, immaterial, or impeaching only on collateral matters. Thus, the trial court's refusal to order the prosecutor to confer use immunity was plainly correct.

We have expressed our thoughts on the issue at some length because we do not agree with Judge Broderick's

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and Vizcarrondo, was fully absorbed with the presentation of the case in the trial room.

The demand that witnesses be immunized was made at the close of the government's case, in the middle of the trial, when neither of the men in charge of the investigation was in a position—because of their trial duties—either to make a meaningful recommendation to the United States attorney that the testimony requested might be necessary to the public interest, or to shoulder 'heavy burden' (*Kastigar* v. *United States,* 406 U.S. 441, 461 (1972) of marshalling the evidence then available with respect to any of the proposed witnesses whom the government might indict in the future.

The resourcefulness of defense counsel at trial, and their thorough knowledge and understanding of the case, persuade me that they should have been able to anticipate that many prospective witnesses would invoke the Fifth Amendment, and in my judgment they should have presented to the prosecutors and to myself prior to trial the substance if not the details of the applications made at the close of the government's case.

Thus the applications by defendants were not timely. The effects of their untimeliness were to introduce the element of double jeopardy into a situation where it did not belong; and to force the government to consider their applications for immunity to 17 persons involved in an investigation at a time when the two government attorneys with the requisite knowledge were engaged on a full time basis in the presentation of a complex case on trial.

—— F. Supp. at ——.

views on the general availability of defense witness immunity, nor do we wish to see criminal trials regularly interrupted by wide-ranging inquiries concerning the specific pros and cons of defense witness immunity in a particular case. In fact, we think trial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution. No hearing should be held to establish such status. The prosecutor need only show that the witness has been indicted or present to the court *in camera* an *ex parte* affidavit setting forth the circumstances that support the prosecutor's suspicion of the witness's criminal activity. No duty is imposed upon the prosecutor; he simply has an option to rely upon the witness's status as an actual or potential target of prosecution to foreclose any inquiry concerning immunity for that witness. If a case should arise where the witness is not an indicted defendant and the prosecutor cannot or prefers not to present any claim that the witness is a potential defendant, and if the defendant on trial demonstrates that the witness's testimony will clearly be material, exculpatory, and not cumulative, it will be time enough to decide whether in those circumstances a court has any proper role with respect to defense witness immunity. Of course, our limited interpretation of the Fifth Amendment's application to this issue does not preclude broader action by United States Attorneys under the existing authority of § 6002 nor legislative action to define circumstances in which defense witness immunity should be granted.

Affirmed.

Appendix C

LUMBARD, *Circuit Judge* (concurring in part; dissenting in part):

I concur in affirming the conviction. I dissent, however, from the observations in Judge Newman's opinion which imply that under certain circumstances the district court would be under the duty of inquiring into whether or not the prosecution should grant use immunity to a prospective defense witness. In my view it is not the proper business of the trial judge to inquire into the propriety of the prosecution's refusal to grant use immunity to a prospective witness.

In our adversary system the judge best performs his function by remaining completely impartial and objective and keeping entirely apart from the decisions which govern the conduct of the Government's case and the presentation of the defense. As Judge Newman's careful analysis shows, the continuing investigation and the unexpected development of evidence, and the willingness of co-conspirators to give evidence, all bear upon the difficult and delicate decisions which prosecutors must make in recommending indictments and in presenting evidence at trial. Even if it were possible for the judge to be sufficiently informed of all the pertinent facts and considerations—which he cannot be—it is highly undesirable that the judge should be asked to bear a burden that is fraught with the danger that his impartiality and objectivity may seem to be, or may actually be, impaired. The judicial function exercised by the judge should not be confused with the executive function to determine how to prosecute defendants and present evidence against them. This important distinction between government functions, which has the firmest possible roots in the Constitution itself, is ex-

pressly recognized in the immunity statute. This statute places the decision to grant in the hand of the Department of Justice and they leave to the court only the ministerial function of granting the order and thus directing that the statute is observed.

I see nothing in theory, or in practice, to be gained by any procedure whereby the prosecutor may be called upon to state that he has reason to believe that the intended witness is a possible defendant. Theoretically, the response of the prosecutor is simply that his refusal to agree to use immunity is justified by the mere claim of the witness. The witness presumably knows more about his own involvement in the allegedly illegal activities of the defendant. Consequently, the government cannot be expected to forego the unrestricted use of the witness' testimony, and cannot be required to undergo the difficulty of managing separate staffs to ensure compliance with a restriction that no use may be made of what the witness might say.

It is not difficult to see what will happen if we suggest that trial judges should examine claims of defendants that use immunity should be granted to prospective witnesses who otherwise would refuse to testify under the Fifth Amendment. Let us suppose the prosecutor has indicted five defendants. Each one could claim that one or more of his co-defendants would, if granted use immunity, give testimony favorable to his defense. There would then be five separate trials, as it would be difficult for the judge to find that the defendant's claim is groundless. To prosecute five separate trials the prosecutor's office would have to create five separate and completely different staffs of attorneys to insulate the prosecutor from any later claim that some use had in fact been made of testimony given by

the defendant when he was a witness for a co-defendant at an earlier trial.

In many cases the witness will assert that his lawyer really cannot know whether the witness (who may think himself to be an innocent bystander) might, short of immunity, be providing a missing link in the chain of circumstantial evidence. The prosecution can then ask that the proposed witness be examined by counsel, *in camera* and under oath, to determine whether there is in fact a good faith assertion that the witness' testimony may tend to incriminate him. The knee-jerk use of the Fifth Amendment by witnesses is usually a device to avoid the unpleasant and embarrassing experience of testifying against a friend or someone whose retaliation is feared. Although everyone knows this, the claim of the Fifth Amendment privilege is hardly ever questioned even when witnesses use it to avoid stating their address or occupation or whether they know a person.

Thus, if we are to open the door to collateral proceedings to determine the propriety of the prosecution's refusal to give use immunity to intended witnesses, the district courts should also be prepared to spend some time inquiring into the good faith of Fifth Amendment claims which are made as a ploy to get use immunity, or, if use immunity is denied, to use the denial as a ground for appeal after conviction. The prosecutor's request for such a hearing to test the good faith of the claim would surely be entitled to as much consideration as would be the demand for use immunity because experience teaches that it is far more likely than not that there is no basis for the claim.

In sum, I do not see how the prosecutor's refusal to grant use immunity to a witness, who suggests by his claim of immunity that he might well be a suitable target for inves-

tigation, can ever be considered improper interference with the production of evidence.

Every unnecessary disclosure of information by the prosecution increases the difficulties of administering criminal justice: whether or not the prosecutor has any evidence about the potential witness is information which may be of value to the witness. A prosecutor may have an indication not rising to the level of admissible evidence or even to the point where it could be considered "persuasive" (albeit inadmissible) by a trial judge. If the judge rejects the *ex parte* submission of the prosecutor, then the potential witness may be relatively certain that his activities are undiscovered. Clearly such a procedure may have great value to the wrongdoer.

Indeed, by suggesting that there may be cases where the court should inquire of the prosecution about use immunity, we invite wrongdoers to come forward as potential witnesses to ascertain if they have been discovered. It is apparent that the district courts may expect an increasing number of applications for use immunity inquiries.

Moreover, the requirement that some record be made of the prosecutor's response presents obvious dangers. Such material which may be of great value to the wrongdoer-potential witness will necessarily be disclosed to others beyond those who need to know—a typist, a clerk, a reporter or other aide.

For these reasons, I conclude that the potential harm to the administration of criminal justice which is involved in any inquiry into the grant of use immunity to a witness so far outweighs any possible need for such a procedure to ensure fair trials, that I would prohibit the district court from entertaining such an application or conducting such an inquiry.